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v.  
William Hohri, et al.

Docketed:  
September 26, 1986

Court: United States Court of Appeals for  
the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Zelenko, Benjamin L.

Entry	Date	Note	Proceedings and Orders
1	Aug 11 1986		Application for extension of time to file petition and order granting same until September 27, 1986 (white, August 13, 1986).
2	Sep 26 1986	G	Petition for writ of certiorari filed.
3	Oct 24 1986		Brief of respondents William Hohri, et al. in opposition filed.
4	Oct 29 1986		DISTRIBUTED. November 14, 1986
5	Nov 5 1986	X	Reply brief of petitioner United States filed.
6	Nov 17 1986		Petition GRANTED. Justice Scalia OUT. *****
8	Dec 12 1986		Order extending time to file brief of petitioner on the merits until January 16, 1987.
9	Jan 15 1987		Joint appendix filed.
10	Jan 16 1987		Brief of petitioner United States filed.
12	Feb 17 1987		Brief of respondents William Hohri, et al. filed.
13	Feb 17 1987		Brief amicus curiae of California and Hawaii filed.
14	Feb 17 1987		Brief amicus curiae of American Friends Service Committee, et al. filed.
15	Feb 19 1987		Lodging received. (10 copies).
16	Feb 17 1987		Brief amicus curiae of Fred Korematsu, et al. filed.
17	Feb 17 1987		Brief amicus curiae of ACLU, et al. filed.
18	Mar 4 1987		Record filed.
19	Mar 13 1987		CIRCULATED.
20	Mar 11 1987		SET FOR ARGUMENT. Monday, April 20, 1987. (4th case).
21	Mar 31 1987	X	Reply brief of petitioner United States filed.
22	Apr 20 1987		ARGUED.

**PETITION  
FOR WRIT OF  
CERTIORARI**

86-510

No.

Supreme Court, U.S.

FILED

SEP 26 1986

JOSEPH E. SPANIOL, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HOHRI, ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## **QUESTIONS PRESENTED**

1. Whether the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction under 28 U.S.C. 1295(a)(2) over the appeal in a case brought under both the Tucker Act and the Federal Tort Claims Act (FTCA); and, if not, whether the Federal Circuit nonetheless has exclusive jurisdiction when the FTCA claim is frivolous because plaintiffs never filed an administrative claim as required by 28 U.S.C. 2675(a).

2. Whether Takings Clause claims brought by Japanese-Americans and resident Japanese aliens for losses incurred during World War II are barred by the six-year statute of limitations (28 U.S.C. 2401).

## PARTIES TO THE PROCEEDING

Respondents are William Hohri; Hannah Takagi Holmes; Chizuko Omori, individually and as representative for Haruko Omori; Midori Kimura; Merry Omori; John Omori, individually and as representative for Juro Omori; Gladyce Sumida; Kyoshiro Tokunaga; Tom Nakao; Harry Ueno; Edward Tokeshi; Kinnosuke Hashimoto; Nelson Kitsuse, individually and as representative for Takeshi Kitsuse; Eddie Sato; Sam Ozaki, individually and as representative for Kyujiro Ozaki; Kumao Toda, individually and as representative for Suketaro Toda; Kaz Oshiki; George R. Ikeda; Theresa Takayoshi, individually and as representative for Tomeu Takayoshi; and the National Council for Japanese American Redress.

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

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No.

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HOHRI, ET AL.

---

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The majority and dissenting opinions of the court of appeals panel (86-298 Pet. App. 1a-71a)<sup>1</sup> are reported at 782 F.2d 227. The order of the court of appeals denying rehearing en banc and the accompanying opinions (86-298 Pet. App. 72a-96a) are reported at 793 F.2d 304. The opinion of the district court (86-298 Pet. App. 97a-147a) is reported at 586 F. Supp. 769.

## JURISDICTION

The judgment of the court of appeals was entered on January 21, 1986. A petition for rehearing with suggestion for rehearing en banc was denied on May 30, 1986 (86-298 Pet. App. 72a-73a). On August 13, 1986, Justice White extended the time

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<sup>1</sup> The materials that we would ordinarily include in an appendix to this petition have already been filed with the Court as an appendix to the petition in No. 86-298, *Hohri v. United States*, seeking review of the same judgment on different grounds. Accordingly, we will cite the relevant documents as they appear in that appendix.

within which to file a petition for a writ of certiorari to and including September 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATUTES INVOLVED

28 U.S.C. 1295 provides in pertinent part:

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction —

\* \* \*

(2) of an appeal from a final decision of a district court of the United States \* \* \* if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title \* \* \* shall be governed by sections 1291, 1292, and 1294 of this title \* \* \*.

28 U.S.C. 1346 provides in pertinent part:

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

\* \* \*

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort \* \* \*.

(b) Subject to the provisions of chapter 171 of this title, the district courts \* \* \* shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his

office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2401 provides in pertinent part:

(a) \* \* \* [E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues \* \* \*.

#### STATEMENT

1. Respondents are an organization of Japanese-Americans and 19 Americans of Japanese ancestry or resident Japanese aliens who were interned under the Japanese evacuation program during World War II, or are descended from internees. On March 16, 1983, respondents filed this class action<sup>2</sup> against the United States, alleging 22 causes of action arising out of the evacuation and internment, including violations of the Constitution (Counts I-XV), the civil rights laws (Count XVI), and the Federal Tort Claim Act (FTCA) (Counts XVII-XX), and allegations of breach of contract (Count XXI) and fiduciary duty (Count XXII). Jurisdiction was alleged under 28 U.S.C. 1331, 1346(a)(2), and 1346(b) and other provisions.

On a motion by the government to dismiss for lack of subject-matter jurisdiction (Fed. R. Civ. P. 12(b)(1)), the district court dismissed the suit in its entirety (86-298 Pet. App. 97a-147a). The court held that the alleged constitutional wrongs, with one

<sup>2</sup> Respondents requested certification of a class consisting of the approximately 120,000 Japanese-Americans and resident Japanese aliens (or their descendants, if no longer living) who were involved in the relocation and internment program. The question of class certification was postponed until after resolution of petitioner's motion to dismiss. 86-298 Pet. App. 98a-99a & n.1.



exception, failed to state causes of action for compensation against the United States, and that implication of any such causes of action is barred by sovereign immunity. The exception was respondents' claims under the Takings Clause (Count III), which are cognizable under the Tucker Act.<sup>3</sup> 86-298 Pet. App. 119a-121a.

The district court then held (86-298 Pet. App. 126a-137a) that, although claims brought under the Takings Clause state a cause of action against the United States under the Tucker Act, respondents' claims were barred by the six-year statute of limitations (28 U.S.C. 2401(a)). Respondents had argued that the statute of limitations had been tolled because the United States had fraudulently concealed memoranda suggesting that there had been no military necessity for the evacuation of Japanese-Americans on the West Coast. Respondents had further argued that the statute did not begin to run until 1982, when this evidence was compiled and released in a report by the Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied*. Assuming that the statute could be tolled by the type of concealment alleged, the district court found that the evidence on which respondents relied had been "available, and publicized, since soon after the war's conclusion," and that any new evidence disclosed in the Commission's report was not essential to respondents' cause of action. 86-298 Pet. App. 130a-136a.<sup>4</sup> The district court concluded that the statute of limitations had not been tolled and that respondents' claims were therefore barred.

<sup>3</sup> 28 U.S.C. 1346(a)(2), 1491. The claims in this case are for \$10,000 or less (86-298 Pet. App. 118a n.19) and thus came within the jurisdiction of the district court under Section 1346(a)(2), known as the "Little Tucker Act" (see, e.g., 86-298 Pet. App. 61a). Claims for more than \$10,000 are within the exclusive jurisdiction of the United States Claims Court under Section 1491.

<sup>4</sup> In asserting that evacuation was unnecessary, respondents relied on a number of documents, including three written during the war that called into question the military necessity for the evacuation. One of those documents, a memorandum prepared in January 1942 by Lt. Commander Kenneth Ringle of the Office of Naval Intelligence, opined that the "Japanese problem" had been magnified out of proportion, that 75% of American Japanese were loyal and a majority of resident Japanese aliens "at least passively loyal to the United States," and that the "potentially dangerous element" could be individually identified. C.A. App. 91-93. The other two memoranda, by FCC

Similarly, the district court found that respondents' tort claims were barred by the FTCA's two-year statute of limitations (28 U.S.C. 2401(b)) and by respondents' failure to exhaust their administrative remedies as required by 28 U.S.C. 2675(a). 86-298 Pet. App. 140a-143a. The court also dismissed the civil rights claims on the basis of sovereign immunity and the statute of limitations (*id.* at 143a), the breach of contract claim on the basis of the statute of limitations (*id.* at 137a-139a), and the breach of fiduciary duty claim on the basis that no fiduciary duty existed (*id.* at 139a-140a).

2. a. A divided panel of the United States Court of Appeals for the District of Columbia Circuit held that it had jurisdiction over the appeal. The majority recognized that 28 U.S.C. 1295(a)(2) provides that exclusive jurisdiction lies in the United States Court of Appeals for the Federal Circuit if the

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Chairman James Fly and FBI Director J. Edgar Hoover, questioned certain findings concerning ship-to-shore communications stated in reports of the Commanding General of the Western Defense Command to have occurred along the West Coast. See 86-298 Pet. App. 110a-112a. The district court found that the Ringle, Fly, and Hoover memoranda were published in 1949 in M. Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation* (1949) (86-298 Pet. App. 130a-131a) and that "the events surrounding the evacuation and internment have been subjected to intense scrutiny over the years and have produced a lengthy literature" (*ibid.* & n.26).

Respondents also pointed to a number of documents that were apparently disclosed for the first time in the 1982 report of the Commission on Wartime Relocation and Internment of Civilians. In general, the district court found that these documents were either irrelevant to respondents' claims or corroborative of information already available. 86-298 Pet. App. 132a-133a. It discussed more specifically wartime Justice Department memoranda in which Edward Ennis, Director of the Department's Alien Enemy Control Unit, and attorney John Burling urged that the evidence questioning military necessity—notably, the substance of the Ringle report, which had been published in *Harper's Magazine* in October 1942—should be called to this Court's attention in the briefs in *Korematsu v. United States*, 323 U.S. 214 (1944), and *Hirabayashi v. United States*, 320 U.S. 81 (1943). See 86-298 Pet. App. 113a-116a & n.15. With respect to the Ennis and Burling memoranda, the court concluded that because the "underlying documents" (*i.e.*, the Ringle, Fly, and Hoover memoranda) had become public in the 1940s, the "concealment, whether intentional or not, [was] not a basis for tolling a statute of limitations beyond the time the information concealed by that conduct was published." *Id.* at 133a-136a.

district court's jurisdiction was based in whole or in part on 28 U.S.C. 1346, except "where original jurisdiction is based, *inter alia*, on Federal Tort Claims Act (FTCA) claims" (86-298 Pet. App. 21a). The majority held that the "except" clause in Section 1295(a)(2) deprived the Federal Circuit of jurisdiction when an FTCA claim is joined with a Tucker Act claim (86-298 Pet. App. 21a-22a).

The majority recognized that the Federal Circuit's jurisdiction remains exclusive when the FTCA claim in a complaint is frivolous, but found the FTCA claim in this case nonfrivolous because it was not "substantively farfetched" (86-298 Pet. App. 21a-22a n.27). Nevertheless, the majority affirmed dismissal of the FTCA claim because plaintiffs had not met the "unyielding," "jurisdictional," and "mandatory" requirement of 28 U.S.C. 2675(a) that they comply with administrative filing requirements (86-298 Pet. App. 33a). The majority also held that the two-year statute of limitations (28 U.S.C. 2401(b)) had begun to run in 1980 and that any FTCA claims were time barred (86-298 Pet. App. 34a & n.48). With the FTCA claims thus removed from the case, the court of appeals held that all future appeals would indeed be within the exclusive jurisdiction of the Federal Circuit (*id.* at 24a n.31).

On the merits, the court of appeals affirmed the district court's dismissal of all of respondents' claims except the Takings Clause claim, and the panel divided on whether that claim was time barred. The majority reversed the district court on the ground that the statute of limitations had been tolled until 1980. The majority began with the premise that in *Korematsu v. United States*, 323 U.S. 214 (1944), and *Hirabayashi v. United States*, 320 U.S. 81 (1943), this Court had established a "virtually insurmountable presumption of deference to the judgment of the military authorities" that evacuation of all Japanese-Americans was mandated by military necessity (86-298 Pet. App. 6a).<sup>5</sup> The court of appeals inferred that, because of this standard of deference, any claim for just compensation brought

<sup>5</sup> In *Korematsu* and *Hirabayashi* this Court affirmed the conviction of two Japanese-Americans who had violated an exclusion order and a curfew order, respectively.

after the war would have been barred on the ground that the taking was justified by military necessity (86-298 Pet. App. 19a-20a, 45a; but see *id.* at 27a-28a) and would not have "survive[d] a threshold motion to dismiss" (*id.* at 42a n. 57).

The majority accepted the district court's finding that evidence concealed during the war had been in the public domain since 1949, but then held that that evidence was insufficient: the only "concealed evidence \* \* \* sufficient to rebut the presumption of deference to the military judgment" would be "nothing less than an authoritative statement by one of the political branches, purporting to review the evidence when taken as a whole" (86-298 Pet. App. 46a (emphasis omitted)). Thus, although the material evidence had been available for more than 35 years, the court held that the statute of limitations on respondents' taking claim did not begin to run until one of the political branches acknowledged "that there was reason to doubt the basis of the military necessity rationale" (*id.* at 49a). The majority found that "authoritative statement" in Congress's passage in 1980 of an Act creating the Commission on Wartime Relocation and Internment of Civilians (50 U.S.C. App. 1981 note).<sup>6</sup> By passing that Act, "Congress finally removed the presumption of deference to the judgment of the political branches," and "the statute of limitations began to run" (86-298 Pet. App. 50a (footnote omitted)). Since respondents' taking claims were filed in 1983, less than six years after the passage of the Act, the court held that the statute of limitations had not run.

b. Chief Judge Markey of the Federal Circuit, sitting by designation, dissented on both the jurisdictional and the statute of limitations questions. With respect to jurisdiction, he argued that the "except" clause in Section 1295(a)(2) deprived the Federal Circuit of jurisdiction over cases brought under Section 1346 only when the case was brought "*in whole* under one of

<sup>6</sup> Section 2(a)(3) of that Act is a congressional finding that "no sufficient inquiry has been made into" the internment. Section 4 is a directive to the Commission to review the facts and circumstances of the internment and accompanying military directives and to "recommend appropriate remedies." 50 U.S.C. App. 1981 note.



the excepted subsections of § 1346" (86-298 Pet. App. 59a). He reasoned that the majority's contrary rule was at odds with Congress's desire to create uniformity in Tucker Act adjudication by centralizing appeals in the Federal Circuit and would encourage forum shopping (*id.* at 61a-63a).<sup>7</sup>

On the merits, Chief Judge Markey contested the majority's reasoning, accusing the majority of reaching a "feel-good result" (86-298 Pet. App. 57a). The majority held, he said, that "the statute must be tolled for whatever length of time \* \* \* it may take for a plaintiff, who knows all about the injury and defendant's identity, to learn something that might enable him to win" (*id.* at 66a). He pointed out that the district court's finding that respondents had sufficient evidence to file a complaint 35 years ago "has not been found clearly erroneous—indeed, it has not truly been contested" (*id.* at 67a-68a).

3. a. The court of appeals declined to rehear the case en banc, with five judges dissenting in an opinion by Judge Bork (86-298 Pet. App. 72a-91a). On the jurisdictional question, the dissenters noted that, under the majority's interpretation of Section 1295(a)(2), "a suit based in whole or in part on the Tucker Act must be appealed to the Federal Circuit, unless it is also based in part on the Federal Tort Claims Act, in which case it must be appealed to one of the twelve regional courts of appeals" and described that result as "stand[ing] the statute on its head" (86-298 Pet. App. 84a-85a). The dissenters added that "the federal tort claim in this case was clearly frivolous" "because no non-frivolous legal arguments may be made in its defense" and stated that no rationale, other than a desire to decide the appeal, existed for the majority's "inventive rule" that an FTCA claim could be frivolous only if *substantively* far-fetched (*id.* at 89a).

The dissenters also disagreed with the majority on the tolling of the statute of limitations. They argued that the majority's insistence on an authoritative statement from a political branch

<sup>7</sup> Chief Judge Markey also explained (86-298 Pet. App. 59a-60a) why a comparison of the "except" clause in Section 1295(a)(2) with that in Section 1295(a)(1), dealing with patent appeals, did not support the majority's result, as the majority claimed.

resulted from a misinterpretation of *Hirabayashi* and *Korematsu* as "creat[ing] a rule of *absolute* and *permanent* judicial deference to any claim of 'military necessity' " (86-298 Pet. App. 75a), and that if such a statement was required it was made in 1976 by President Ford (*id.* at 78a n.1).<sup>8</sup> In addition, they contended that the claims presented in this suit had never been barred by "military necessity" since that doctrine applies only to property destroyed in battle or diverted or rationed by a war-time regulatory program (*id.* at 80a-81a); here, "the taking of property was not the object of, nor was it in any way necessary to, the relocation program" (*id.* at 80a). Finally, the dissenters concluded that "even if the legal justification for the relocation were identical to that needed to render a taking noncompensable, which it is not, and a statement from the political branches necessary, which it is not, and the statement from President Ford irrelevant, which it is not, the statement by one of the 'war-making branches' the panel majority requires could have been extracted through litigation. This means that this suit could have been brought successfully at any time within the past forty years and that the six-year limitations period had long since passed" (*id.* at 82a).

b. In a separate statement, Judges Wright and Ginsburg defended the panel majority's opinion (86-298 Pet. App. 92a-96a). They repeated their position that this Court's "clear, pin-pointed, and definite" holdings in *Korematsu* and *Hirabayashi* posed "an insuperable obstacle to the present suit until the 'war-making branches,' *Korematsu*, 323 U.S. at 218-19, released the federal courts from the grasp of *Korematsu* and *Hirabayashi*" (86-298 Pet. App. 92a). Judges Wright and Ginsburg continued to read those cases "to have established the military necessity of the internment policy for both the particular claims at issue in those cases and the takings clause claims now before the court" (*id.* at 93a n.1). "[W]hen the Supreme Court has definitively held that deference to a military

<sup>8</sup> See Proclamation No. 4417, 3 C.F.R. 8 (1977) (calling the evacuation "wrong" and a "national mistake[]"). The dissenters suggested that the majority had discounted the Proclamation because it was "inconveniently early" to preserve respondents' suit (86-298 Pet. App. 78a n.1).

judgment is due in a particular case, litigants may not reasonably be required to re-litigate that issue in advance of a green light from the 'war-making branches' " (*id.* at 93a (footnote omitted)).<sup>9</sup>

Judges Wright and Ginsburg also defended their jurisdictional holding on the ground that Section 1295(a)(2) "is densely composed" and "has been a source of confusion" and that Congress should amend it to "obviate court conflicts" (86-298 Pet. App. 95a). As to the frivolousness of the FTCA claims, these judges denied that their "substantively farfetched" test would extend to claims brought by plaintiffs who plainly lack standing, present moot claims, or flout basic procedural requirements (*ibid.*).

#### REASONS FOR GRANTING THE PETITION

1. This Court has recently recognized that the application of 28 U.S.C. 1295(a)(2) to mixed cases involving both Tucker Act issues and claims within the "except" clause is "difficult and unsettled." *United States v. Mottaz*, No. 85-546 (June 11, 1986), slip op. 14 n.11. This case bears witness to the Court's observation. The majority's holding in this case that mixed Tucker Act/FTCA cases must be appealed to the regional circuit is in conflict with five dissenting votes on the D.C. Circuit, the view of the chief judge of the Federal Circuit, and an unequivocal Federal Circuit decision stating that "the 'except clause' applies only to cases brought *in whole* under one of the excepted subsections of § 1346 and *not* even 'in part' under the non-revenue provisions of § 1346(a)(2)" (*Bray v. United States*, 785 F.2d 989, 990 (1986)). Litigants in mixed cases are in the intolerable situation of not knowing whether appeals should be taken to the regional circuit or the Federal Circuit (or both). Since Congress has not taken the suggestion that it amend Section 1295(a)(2) to clear up the confusion and court conflicts that the panel majority acknowledges, review by this Court is necessary.

<sup>9</sup> Judges Wright and Ginsburg stated that President Ford's 1976 Proclamation did not "provide[] such a green light" because it "announce[d] merely that the internment policy was *morally*, not legally, wrong" (86-298 Pet. App. 93a n.2).

In our view, all cases in which the jurisdiction of the district court "was based, in whole or in part" (28 U.S.C. 1295(a)(2)), on the Tucker Act are within the exclusive jurisdiction of the Federal Circuit, no matter what other claims have been joined with the Tucker Act claim in the complaint. Even if we are wrong on that point, and mixed Tucker Act/FTCA cases must be appealed to the regional circuit, this is not a true mixed case, for there is no principled basis to deem the FTCA claim in this case nonfrivolous.

a. It is common ground between the majority and the dissents below that Congress sought to centralize Tucker Act appeals in the Federal Circuit (86-298 Pet. App. 21a, 61a, 86a).<sup>10</sup> To that end, Congress explicitly provided for Federal Circuit jurisdiction over appeals from district court decisions even when the jurisdiction of the district court rested only "in part" on the Little Tucker Act (28 U.S.C. 1295(a)(2)). Thus, the general rule is certainly that a case including a Tucker Act claim is appealed in its entirety to the Federal Circuit, "even though the case contains a due process claim, or an equal protection claim, or any of numerous other important constitutional and statutory claims" (86-298 Pet. App. 86a). That rule is in accordance with Congress's observations when it created the Federal Circuit that it was not to be a "specialized court."<sup>11</sup>

<sup>10</sup> In addition to its Section 1295(a)(2) jurisdiction to hear appeals from district court decisions under the Little Tucker Act, the Federal Circuit has exclusive jurisdiction to hear appeals from decisions of the Claims Court (see 28 U.S.C. 1295(a)(3)), which has concurrent jurisdiction over Little Tucker Act cases and exclusive jurisdiction over Tucker Act cases involving more than \$10,000 (see 28 U.S.C. 1346(a)(2), 1491). See generally *Bray v. United States*, 785 F.2d at 991.

<sup>11</sup> H.R. Rep. 97-312, 97th Cong., 1st Sess. 19 (1981); S. Rep. 97-275, 97th Cong., 1st Sess. 6 (1981); H.R. Rep. 96-1300, 96th Cong., 2d Sess. 17 (1980); S. Rep. 96-304, 96th Cong., 1st Sess. 13 (1979); *Federal Courts Improvement Act of 1981—S. 21 and State Justice Institute Act of 1981—S. 537: Hearings on S. 21 and S. 537 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 270 (1981) (statement of Daniel M. Friedman, Chief Judge, U.S. Court of Claims) (appropriate for Federal Circuit to determine antitrust claim joined with patent claim even though predecessor courts did not decide antitrust cases); *Additional Judicial Positions: Hearing Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 116 (1981) (statement of Chief Judge Howard T. Markey,



The question posed here is whether the except clause of Section 1295(a)(2) was intended to deprive the Federal Circuit of any jurisdiction over cases containing claims of the type enumerated therein, or rather simply indicates that the excepted causes of action may not serve as an affirmative basis for Federal Circuit jurisdiction. We believe the statutory language and legislative history show that the latter interpretation is correct. As the House Report makes clear, the except clause merely indicates that Federal Circuit jurisdiction does not derive from the presence in a case of FTCA, tax refund, and quiet title claims;<sup>12</sup> it does not suggest that the regional courts of appeals are to have exclusive jurisdiction over all such claims, even when they are joined with a Tucker Act (or other) cause of action that would otherwise be heard by the Federal Circuit.<sup>13</sup> Congress had

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U.S. Court of Customs and Patent Appeals); *id.* at 119 (statement of Chief Judge Friedman); *Court of Appeals for the Federal Circuit—1981: Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 18, 38 (1981) (statement and testimony of Chief Judge Friedman) [hereinafter *1981 House Hearings*]; *id.* at 45 (remarks of Congressman Sawyer); *Industrial Innovation and Patent and Copyright Law Amendments: Hearings on H.R. 6033, H.R. 6934, H.R. 3806, and H.R. 2414 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 378-379 (1980) (statement of Maurice Rosenberg, Assistant Attorney General); *id.* at 708 (testimony of Chief Judge Friedman).

<sup>12</sup> Section 1295(a)(2) "gives the Court of Appeals for the Federal Circuit jurisdiction of any appeal from a trial court where the jurisdiction of the district court was based, in whole or in part, on section 1346 of title 28, United States Code, except 1346(a)(1) and (e) (tax appeals), 1346(b) (Federal Tort Claims), 1346(f) (quiet title actions), or 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue" (H.R. Rep. 97-312, *supra*, at 42).

<sup>13</sup> In fact, at least in the case of quiet title actions, it appears that Congress was quite willing to centralize appeals in the Federal Circuit until then-Chief Judge Friedman suggested (and the Department of Justice agreed) that quiet title actions should be added to the except clause on the ground that the Court of Claims had not traditionally heard them. See *1981 House Hearings* 213. It would be quite remarkable if Congress, in accepting that suggestion, had decided that regional circuit jurisdiction over quiet title action appeals was so

no such affirmative desire to prevent the Federal Circuit, which may otherwise hear any kind of claim attached to a Tucker Act claim, from hearing "except clause" claims; it merely concluded that they did not call for explicit centralization under a grant of exclusive Federal Circuit jurisdiction. We therefore submit that mixed Tucker Act/FTCA cases, like mixed cases involving the Tucker Act and any other statute, must be appealed to the Federal Circuit in keeping with Congress's purpose to centralize Tucker Act appeals, and that the court below lacked jurisdiction.<sup>14</sup>

b. The majority below acknowledged that, even under its rule, only a true mixed case would come within the jurisdiction of the regional circuit, since otherwise litigants could always choose their appellate forum by adding a nonviable FTCA (or other "except clause") claim to a Tucker Act claim. Thus, the majority held that the FTCA claim must be nonfrivolous in order to confer jurisdiction on the regional court of appeals. The legislative history supports the proposition that frivolous allegations in the complaint are to be disregarded for purposes of determining jurisdiction under Section 1295.<sup>15</sup> The majority recognized that plaintiffs had clearly failed to comply with the jurisdictional FTCA administrative claim requirement, and that the causes of action were time barred. Yet the majority held that they were not frivolous.

The majority initially reached that result by asserting that a claim is frivolous only if it is "substantively farfetched" (86-298 Pet. App. 22a n.27). If that holding were followed, litigants

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important that the Federal Circuit not only would not hear all of them, but also would not hear *any* of them, even when the quiet title claim was joined with a Tucker Act claim.

<sup>14</sup> Congress's purpose to centralize Tucker Act appeals, of course, could also be served by bifurcating appeals, sending the Tucker Act issues to the Federal Circuit and the non-Tucker Act issues to the regional circuit (a procedure that would have required a different outcome below). See *United States v. Mottaz*, No. 85-546 (June 11, 1986), slip op. 14 n.11. In our view, however, as the "in whole or in part" language of Section 1295(a)(2) suggests, Congress did not intend such bifurcation. See generally *Atari, Inc. v. JS & A Group, Inc.*, 747 F.2d 1422 (Fed. Cir. 1984); *Federal Courts Improvement Act of 1979: Hearings on S. 677 and S. 678 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 41 (1979) (testimony of Daniel J. Meador, Assistant Attorney General).

<sup>15</sup> See, e.g., S. Rep. 97-275, *supra*, at 19; H.R. Rep. 97-312, *supra*, at 41.

wishing to litigate in the regional circuit would have a major incentive to join procedurally defective but substantively plausible claims with their Tucker Act claims in order to avoid Federal Circuit jurisdiction. The majority appears to have abandoned this rationale on rehearing, but has entirely freed itself from the need to follow any principle of law and has simply announced, without reasoning, that litigants may control appellate jurisdiction by " 'failure to grasp in full' " unequivocal precedent that renders an FTCA claim impossible (*id.* at 95a).

Since the FTCA claims were frivolous, the majority should have held that it had no jurisdiction even under its construction of Section 1295. This Court should grant certiorari to correct the court's unprincipled assertion of jurisdiction.

2. As President Ford proclaimed in 1976, the wartime evacuation of persons of Japanese ancestry was one of "our national mistakes" and a "setback to fundamental American principles"; "the tragedy of that long-ago experience" must "never again be repeated." Proclamation No. 4417, 3 C.F.R. 8-9 (1977).<sup>16</sup> Our national misjudgment under pressures of war in the 1940s, however, does not suggest that a lawsuit may be brought in the 1980s to challenge those events. Like all who have suffered wrongs, respondents had the duty to pursue their claims diligently, and to bring them within the time provided by the statute of limitations. See *United States v. Kubrick*, 444 U.S. 111, 117, 125 (1979). And the courts, in evaluating a statute of limitations defense, must bear in mind that the six-year statute in this case (28 U.S.C. 2401(a)), as a condition on the waiver of sovereign immunity, must be strictly construed (see, e.g., *Block v. North Dakota ex rel. Board of University & School Lands*, 461 U.S. 273, 287 (1983)).

The construction of the statute of limitations by the court of appeals was anything but strict. That court embraced the unprecedented conclusion that the statute of limitations was not

<sup>16</sup> In 1947, the 80th Congress passed the American-Japanese Evacuation Claims Act, 50 U.S.C. App. 1981-1987, under which more than 26,500 Japanese-Americans in fact filed successful claims for compensation for property that they lost in "consequence of the evacuation or exclusion" (50 U.S.C. App. 1981(a)).

triggered until there was, in essence, an official *concession* of wrongdoing, an unfamiliar and indefinite legal concept, the inherent manipulability of which is shown by the fact that President Ford's Proclamation was held not to be such a concession but the 1980 Act was. In the absence of a concession, the majority reasoned, neither this Court nor any other court before 1980 would have questioned either the holdings in *Hirabayashi* and *Korematsu* or their extension to a claim for just compensation, which those decisions did not purport to address. The factual background of this case contradicts such a conclusion.

a. This is not an ordinary fraudulent concealment case. Faced with overwhelming historical evidence that facts necessary to put respondents on notice of their claims were disclosed shortly after the war,<sup>17</sup> the court of appeals abandoned that line of argument<sup>18</sup> and concluded that, in this situation, mere disclosure of facts could never suffice to start the running of statute of limitations.<sup>19</sup> Instead, the court demanded "nothing less than an authoritative statement by one of the

<sup>17</sup> The district court found that "all of the necessary facts have long been in the public domain" (86-298 Pet. App. 137a), and that what allegedly was concealed regarding the military necessity rationale for the evacuation "became public and [was] available to diligent plaintiffs from the late 1940's onward" (*id.* at 136a). See note 4, *supra*.

<sup>18</sup> The court of appeals acknowledged that the 1949 publication of a book citing and discussing the allegedly concealed evidence regarding military necessity "[a]t the very least . . . should have alerted [respondents] to the need to conduct further inquiries into the factual basis of their claims" (86-298 Pet. App. 44a n.60). Moreover, the court admitted that the allegedly concealed evidence did "not provide anything more than incremental evidence against the government's case" as presented in *Hirabayashi* and *Korematsu* (86-298 Pet. App. 46a n.62), and that there had always been available "a wealth of factual material attacking the factual predicates of the government's argument" (*id.* at 12a).

<sup>19</sup> The court of appeals did not foreclose the possibility that the government might produce, on remand, previously undisclosed material supporting its original assertion of military necessity for the internment program. In that eventuality, it said, the district court would be "free to find that the statute of limitations was never tolled in this case" (86-298 Pet. App. 47a n.63); but, if the government's failure to cite intelligence reports in *Hirabayashi* and *Korematsu* was caused by the nonexistence of such reports, then the government engaged in "fraudulent concealment" that could only be cured by a presidential or congressional pronouncement. It is difficult to see any relationship between that holding and the doctrine of fraudulent concealment as applied in any other case. See also note 23, *infra*.



political branches, purporting to review the evidence when taken as a whole" and conceding "that there was reason to doubt the basis of the military necessity rationale" (*id.* at 46a, 49a). The court found that authoritative statement in Congress's 1980 finding that "no sufficient inquiry ha[d] been made into" the internment (50 U.S.C. App. 1981 note § 2(a)(3)), which "released the federal courts from the grasp of *Korematsu* and *Hirabayashi*" (86-298 Pet. App. 92a).<sup>20</sup>

There is no precedent for the notion that a statute of limitations may be tolled not only by continued concealment of facts, but also by the failure of the potential defendant to make a public confession of legal error. If the approach of the court of appeals is to be taken seriously, then there is really no such thing as a statute of limitations because a plaintiff may wait to file suit, not until the facts that would support a good-faith complaint are revealed, but until the defendant admits liability. Such a conclusion is no less outrageous as applied to lawsuits against the United States than as applied to any other litigant. It is specifically inconsistent with *United States v. Kubrick*, 444 U.S. 111 (1979), where the Court rejected a far more modest attempt to expand tolling doctrine in an action against the United States.

In *Kubrick*, this Court rejected the suggestion that "for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment" (444 U.S. at 122), and held that the accrual of a claim is not tolled until the putative plaintiff learns that "his injury was legally blameworthy" (*id.* at 121).

<sup>20</sup> Of course, it requires the suspension of disbelief to maintain that Congress's "no adequate inquiry" finding was either necessary or sufficient to release courts from the grasp of *Korematsu* and *Hirabayashi*. It is this Court, not Congress, that overrules past constitutional decisions. If Federal courts are free to disregard *Hirabayashi* and *Korematsu*, it is because of changes in constitutional doctrine since the war, not because of congressional action. As the district court noted, diligent advocates have successfully challenged decisions of this Court in the past, and a suit to challenge *Korematsu* and *Hirabayashi* "could have been filed long ago" (86-298 Pet. App. 132a). In any event, as we show below, at no time would *Korematsu* and *Hirabayashi* have controlled the disposition of respondents' taking claims.

It "would go far to eliminate the statute of limitations as a defense separate from the denial of breach of duty," the Court reasoned, to hold that a claim "accrue[s] only when the plaintiff had reason to suspect or was aware \* \* \* that a legal duty to him had been breached" (*id.* at 125). Under the reasoning of the court of appeals here, the running of the statute of limitations is tolled pending announcement by the United States of its own legal error, which the court viewed as an essential prerequisite to effective litigation of the claim. Thus the plaintiff need not only have reason to perceive a legal wrong—he must be specifically informed of the wrong by the defendant.<sup>21</sup>

b. Even if one accepts the conceptual premise of the court of appeals that a statute of limitations may be tolled where a governmental confession of error is the only avenue leading to relief for meritorious claims of injury, it does not appear that this Court's decisions in *Korematsu* and *Hirabayashi* justify such a conclusion here. The linchpin of the court's analysis is its assertion that the decisions in *Korematsu* and *Hirabayashi* articulated a "nearly irrebuttable" "presumption of deference to the 'war-making branches'" regarding the military justification for the evacuation from the West Coast of Japanese-Americans (86-298 Pet. App. 12a).<sup>22</sup> Thus, according to the court, a

<sup>21</sup> The theory on which the court of appeals tolled the statute of limitations in this case also conflicts with decisions of the Federal Circuit that hold that a putative plaintiff's awareness that he has been injured "on grounds that *he himself* consider[s] to be wrong and improper" is all that is required to trigger the statute of limitations. *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985) (emphasis added), cert. denied, No. 84-1960 (Oct. 7, 1985); see also *Japanese War Notes Claimants Ass'n v. United States*, 373 F.2d 356 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967). Regardless of how the jurisdictional issue in this case is resolved, this intercourt conflict is especially significant since "all subsequent appeals of this case will have to be brought in the Federal Circuit" (86-298 Pet. App. 24a n.31). As a result, the decision below is likely to lead to the remarkable situation in which a conflict between the circuits develops in the context of a single case (see *id.* at 63a (Markey, C.J.) (Federal Circuit will be free to reach a result inconsistent with D.C. Circuit's decision); *id.* at 89a (Bork, J.) (same)).

<sup>22</sup> If the tolling theory that the court of appeals applied in this case were given its face value, it would have astonishing implications. It suggests a rule

suit seeking compensation for property lost in the evacuation could not have survived a defense that simply cited *Korematsu* and *Hirabayashi* for the proposition that the events were mandated by military necessity (*id.* at 16a). The talismanic significance that the court of appeals ascribed to *Korematsu* and *Hirabayashi*, however, is unfounded.

In the first place, neither *Korematsu* nor *Hirabayashi* was founded on or embraced the extreme kind of deference that the court of appeals posited. In *Hirabayashi*, this Court "stated in detail facts and circumstances \* \* \* which support[ed] the judgment of the war-waging branches of the Government" that the evacuation was justified, and this Court found that those facts and circumstances "afforded a rational basis for the decision which [was] made" (320 U.S. at 101-102). The relevant circumstances, according to this Court, were "facts of public notoriety" (*id.* at 102), including the events leading to the evacuation order (*id.* at 85-89), congressional findings (*id.* at 89-92), and the "social, economic and political conditions" that "in the particular war setting \* \* \* set [Japanese-Americans] apart from others" (*id.* at 96, 101). "[T]hose facts, and the inferences which could be rationally drawn from them," the Court concluded, provided "adequate support" for the government's actions (*id.* at 103, 105). Similarly, in *Korematsu*, this Court cited evidence that tended to "confirm[]" (323 U.S. at 219) "the assumptions upon which [it] rested [its] conclusions in the *Hirabayashi* case" (*id.* at 218). It is one thing to say that, in retrospect, the facts recited could not justify the racial

classification imposed; it is quite another to claim that the Court declined to look at the facts and merely accepted the government's assertion that its conduct was justified.<sup>23</sup>

In the second place, neither *Korematsu* nor *Hirabayashi* "holds, or even remotely suggests, that military necessity also required that \* \* \* property be taken" (86-298 Pet. App. 80a

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<sup>23</sup> There is no support in this Court's opinions in *Korematsu* and *Hirabayashi* for the suggestion by the court of appeals (86-298 Pet. App. 11a) that the decisions were influenced by a false belief that undisclosed "official intelligence analysis" supported the military rationale for the evacuation. To the contrary, "[t]he Justice Department, defending the exclusion before the Supreme Court, made no claim that there was identifiable subversive activity." Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 50 (1982) (footnote omitted) (citing Brief for the United States at 11-12, *Korematsu v. United States*, *supra*). This Court based its decisions on what it then perceived as "the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry" (*Hirabayashi*, 320 U.S. at 101). The Court concluded that "[t]he fact alone that attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular associations with Japan" (*ibid.*). There is nothing in the Court's opinions to suggest that the Court relied on any assumptions about intelligence analyses that the government never claimed existed.

Equally without warrant is the assertion by the court of appeals that in *Korematsu* "the majority opinion freely cited to [General DeWitt's] *Final Report*" for facts whose inaccuracy was known to the government (86-298 Pet. App. 14a n.20). A footnote in the government's brief had alerted the Court that the government relied on the *Final Report* only for "details concerning the actual evacuation and events that took place subsequent thereto" (Brief for the United States at 11 n.2, *Korematsu*; see also *id.* at 55 n.28), and no one contends that the *Final Report* was inaccurate as to those details. Consistent with the government's disclaimer, the opinion of the Court cited the *Final Report* once (323 U.S. at 219 n.2), and there only for the proposition that "investigations made subsequent to the exclusion" showed that some evacuees "refused to swear unqualified allegiance to the United States" and that others "requested repatriation to Japan" (*id.* at 219 (footnote omitted); see 86-298 Pet. App. 12a n.19). The Court certainly did not rely on General DeWitt's claims about ship-to-shore signaling by Japanese-Americans, which an earlier draft of the footnote would have specifically criticized as being in conflict with other information possessed by the Department of Justice (see *id.* at 13a-14a).

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of judicial deference to claims of military necessity so powerful that courts will not reexamine what was done even when facts establish the absence of military necessity, or of any plausible belief in its existence (see 86-298 Pet. App. 75a (Bork, J.)). Of course, no such broad application of its reasoning was intended by the court of appeals. Rather, the decision below was designed only to deal "particularly and precisely with the special facts of an extraordinary episode of injustice" (86-298 Pet. App. 92a).



(Bork, J.)).<sup>24</sup> To the contrary, in both ~~directions~~ <sup>decisions</sup> this Court emphasized the narrowness of its ruling—which, in *Hirabayashi*, was limited to sustaining a “curfew order” (320 U.S. at 105) and, in *Korematsu*, was limited to “uphold[ing] [an] exclusion order as of the time it was made and when [it was] violated” (323 U.S. at 219).<sup>25</sup> Moreover, it is no small step beyond the holdings of these cases to conclude that military necessity would also justify the taking of property without compensation in any situation incidental to the exclusion order. The doctrine that, in a military emergency, property can be destroyed without compensation is a narrowly tailored exception to the general rule that “a taking of private property \* \* \* when the emergency of the public service in time of war \* \* \* is too urgent to admit of delay \* \* \* creates an obligation on the part of the government to reimburse.” *United States v. Russell*, 80 U.S. (13 Wall.) 623, 629 (1871). It has been limited almost exclusively<sup>26</sup> to the “extraordinary situation” (*United States v. Central Eureka Mining Co.*, 357 U.S. 155, 182 (1958) (Harlan, J., dissenting)) where property is destroyed “by the operations of armies in the field” (*United States v. Pacific Railroad*, 120 U.S. 227, 239 (1887)) in order “to prevent the enemy from using it” (*United States v. Caltex, Inc.*, 344 U.S. 149, 153 (1952)).<sup>27</sup>

<sup>24</sup> In fact, the court of appeals itself did not rely on language in this Court’s opinions in concluding that *Korematsu* and *Hirabayashi* would have precluded Takings Clause claims, but rather looked to the construction that “the Attorney General and Congress” supposedly placed on those decisions (86-298 Pet. App. 19a). There is, of course, no particular reason to assume that the courts were bound by any construction that the nonjudicial branches may have placed on the decisions of this Court (see *id.* at 81a n.3 (Bork, J.)).

<sup>25</sup> See also *Korematsu*, 323 U.S. at 222 (declining to pass on “momentous questions not contained within the framework of the pleadings or the evidence in this case”).

<sup>26</sup> The doctrine was also applied in *Central Eureka Mining* to hold that “temporary though severe restriction on use of the mines was justified by the exigency of war” because of the need to preserve resources. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982) (footnote omitted).

<sup>27</sup> Significantly, the government did not purport to “take” property from Japanese-Americans who were evacuated (86-298 Pet. App. 4a n.4), but offered to “provide services with respect to the management, leasing, sale,

In the final analysis, however, the misplaced reliance on *Korematsu* and *Hirabayashi* by the court of appeals is most vividly demonstrated by the cases that the court ignored. This Court began to sketch out the limits of the rulings in *Korematsu* and *Hirabayashi* on the same day that *Korematsu* was decided, when it held that Japanese-Americans whose loyalty had been established were entitled to “unconditional release” from relocation camps. *Ex parte Endo*, 323 U.S. 283, 304 (1944). Shortly thereafter, in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), the Court demonstrated that it was indeed willing to overrule a government plea of “military necessity” (327 U.S. at 340 n.1 (Burton, J., dissenting)) when it held that martial law could not be sustained in the Hawaiian Islands even though “one-third of the civilian population [was] of Japanese descent” (*id.* at 333 (Murphy, J., concurring)). In flat contradiction to the entire theory of the decision below, Chief Justice Stone (the author of *Hirabayashi*) stated: “[E]xecutive action is not proof of its own necessity, and the military’s judgment here is not conclusive that every action taken \* \* \* was justified by the exigency” (327 U.S. at 336 (Stone, C.J., concurring)).

Indeed, during the entire period that the evacuation and exclusion orders were in effect the courts remained open to evacuees with civil claims—even if they were enemy aliens. See *Ex parte Kawato*, 317 U.S. 69 (1942). This Court also demonstrated long ago that it would protect the rights of Japanese-Americans who lost property as a result of World War II measures. See *Honda v. Clark*, 386 U.S. 484 (1967) (suit by Japanese-Americans to recover funds seized under the Trading With the Enemy Act); cf. *Oyama v. California*, 332 U.S. 633 (1948); *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948). Finally, it is particularly relevant that, in 1952, this Court held that resident enemy aliens whose property had been seized during World War II under the Trading with the Enemy

storage or other disposition of most kinds of property’ ” (*id.* at 104a, 138a). Based on that offer, respondents claimed that the government’s liability for the property that they lost also arose under theories of contract and bailment (*id.* at 28a). The court of appeals correctly held that those claims could not be tolled, because the existence of a military justification for the evacuation is irrelevant to contract and bailment claims (see *id.* at 50a-51a).

Act were entitled to its return, stating that it was "clear \* \* \* that friendly aliens are protected by the Fifth Amendment requirement of just compensation" and that according less protection to enemy aliens would pose a "constitutional problem." *Guessefeldt v. McGrath*, 342 U.S. 308, 318-319 (1952).

The decisions in *Korematsu* and *Hirabayashi* therefore do not indicate that respondents could not state viable Takings Clause claims until the political branches acknowledged the alleged weakness of the military justification for the wartime evacuation program. The extravagant significance that the court below gave to those decisions does not justify its attempt to escape the statute of limitations.

c. What is perhaps most astonishing about the decision of the court of appeals is that, even if the tolling theory that the court has created had merit, a candid application of that theory still would not prevent the statute of limitations from having run. In 1976 (more than six years before the complaint in this case was filed), President Ford formally revoked the Executive Order under which the evacuation program had been carried out and officially proclaimed that "*we should have known then [that] not only was that evacuation wrong, but [that] Japanese-Americans were and are loyal Americans.*" Proclamation No. 4417, 3 C.F.R. 9 (1977) (emphasis added). In contrast, all that Congress said in 1980 was that there was a need for " 'inquiry' " and for " 'study' " (86-298 Pet. App. 49a). Congress's statement, however, and not President Ford's proclamation four years earlier, is the "authoritative statement" (*ibid.*) that the court of appeals remarkably asserts "released the federal courts from the grasp of *Korematsu* and *Hirabayashi* by indicating that deference was no longer due to the wartime judgment of military necessity" (*id.* at 92a).

Plainly, if an authoritative statement by one of the political branches was needed before the statute of limitations could begin to run, President Ford's Proclamation "fills the need far more naturally" than the 1980 Act. It is equally clear that "[t]he only difficulty" that kept the court of appeals from acknowledging this obvious fact is that "the [Ford] statement is inconveniently early." 86-298 Pet. App. 78a n.1 (Bork, J.).

## CONCLUSION

The petition for a writ of certiorari should be granted.  
Respectfully submitted.

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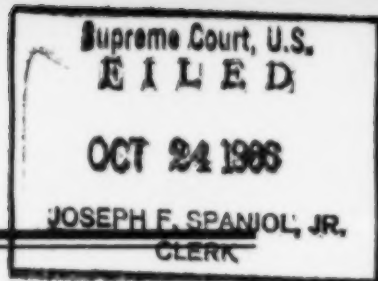
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SEPTEMBER 1986

# **OPPOSITION BRIEF**

(2)  
No. 86-510



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

*Petitioner,*

v.

WILLIAM HOHRI, *el al.*,

*Respondents.*

On Petition For A Writ Of Certiorari To The  
United States Court Of Appeals For  
The District Of Columbia Circuit

BRIEF IN OPPOSITION TO THE GOVERNMENT'S  
PETITION FOR CERTIORARI

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### QUESTIONS PRESENTED

I. Did the Federal Courts Improvement Act, 28 U.S.C. §1295(a), bar the United States Court of Appeals for the District of Columbia Circuit from jurisdiction over an appeal from dismissal of claims under the Federal Tort Claims Act, 28 U.S.C. §1346(b), and the Tucker Act, 28 U.S.C. §1491?

II. Did the court of appeals correctly hold that Government fraud tolled the statute of limitations for plaintiffs' Takings Clause claims?



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THE UNITED STATES OF AMERICA,  
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BRIEF IN OPPOSITION TO THE GOVERNMENT'S  
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OPINIONS BELOW

The opinion of the court of appeals is reported at 782 F.2d 227 (D.C. Cir. 1986) (App. 1a-71a).<sup>1</sup> The district court's opinion is reported at 586 F. Supp. 769 (D.D.C. 1984) (App. 97a-147a). The order of the court of appeals *en banc* denying rehearing, dated May 30, 1986, is not yet reported, and is set out in full in the Appendix (App. 72a-96a).

JURISDICTION

The court of appeals' judgment was entered on January 21, 1986, and the court's order denying rehear-

<sup>1</sup> All references to the Appendix indicate the Appendix filed with Respondents' own Petition for a Writ of Certiorari in this case, No. 86-298.



ing *en banc* was entered on May 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and §1257(3).

#### STATUTES INVOLVED

The Federal Courts Improvement Act, 28 U.S.C. §1295, provides in pertinent part:

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction

\* \* \* \* \*

(2) of an appeal from a final decision of a district court of the United States \* \* \* if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title \* \* \* shall be governed by sections 1291, 1292, and 1294 of this title \* \* \*.

The Federal Tort Claims Act, 28 U.S.C. §1346(b), provides in pertinent part:

Subject to the provisions of chapter 171 of this title, the district courts \* \* \* shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private

person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2401 provides in pertinent part:

(a) \* \* \* [E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

#### STATEMENT

This Court is respectfully referred to Respondents' Statement of facts and proceedings below in their Petition for Writ of Certiorari, No. 86-298. We do not repeat information contained in that Statement or in the Government's Statement of Facts in its Cross-Petition for Certiorari. We do, however, bring the following additional information to the Court's attention regarding the statute of limitations issue raised by the Government.

The district court found "it is *undisputed* that reports from the FCC, the FBI, and Naval Intelligence contradicting the claim of military necessity *were concealed by defendant* throughout the war, as most graphically illustrated by the Ennis and Burling memoranda urging the disclosure of these findings in the *Hirabayashi* and *Korematsu* briefs." (App. 130a, emphasis added.) The district court further noted these internal governmental memoranda "fully justify the condemnation of the wartime Department of Justice voiced by the Commission<sup>2</sup> and the plaintiffs." (App.

<sup>2</sup> The Commission on Wartime Relocation and Internment of Civilians ("CWRIC") was authorized in 1980 by P.L. 96-317 (July 31, 1980).

134a.) The district court held that several scholarly references in the late 1940's regarding the contrariety of military intelligence information were sufficient to overcome the deference due this Court's wartime decisions and to begin the running of the statute of limitations. The Government, however, continued to assert that military necessity compelled the wartime actions, until in 1980 Congress created the CWRIC to review pertinent facts underlying those wartime actions.

The court of appeals reversed the district court, recognizing three major points for analysis of the statute of limitations issue:

First, the government's suppression of critical evidence in the *Hirabayashi* case contributed to the Supreme Court's conclusion that it must defer to the judgment of Congress and the military authorities that the exclusion program was justified by military necessity. Second, *Korematsu* suggests that the mere presentation of facts contradicting the government's claims could not rebut this presumption of deference; only an official statement by one of the political branches, purporting to assess the evidence when viewed as a whole, could carry that burden. Third, congressional action signaled a general assumption that *Korematsu* not only barred challenges to criminal conviction but applied to civil claims as well.

(App. 20a).

The court of appeals held that only the 1980 creation by Congress of the Commission on Wartime

Relocation and Internment of Civilians sufficiently undermined the legal significance of *Korematsu v. United States*, 323 U.S. 214 (1944), and *Hirabayashi v. United States*, 320 U.S. 81 (1943), so as to permit a fair judicial inquiry into the true facts underlying the Government's wartime actions. The court of appeals properly applied traditional tolling principles to the facts of this case, and properly ruled that plaintiffs' Takings Clause claims were timely in light of governmental fraud and concealment.

## ARGUMENT

### I. Plaintiffs' appeal was properly filed in the United States Court of Appeals for the District of Columbia Circuit.

The Government raises a jurisdictional issue regarding the application of the Federal Courts Improvement Act, 28 U.S.C. §1295(a). The Complaint, filed in the United States District Court for the District of Columbia, presented claims arising under both the Tucker Act, 28 U.S.C. §1491, and the Federal Tort Claims Act, 28 U.S.C. §1346(b). The tort claims fall within the express "except" clause in §1295(a)(2), authorizing an appeal of such claims to the United States Court of Appeals for the District of Columbia Circuit.

The Government attempts to avoid the obvious "except" clause for tort claims by arguing that because the district court dismissed plaintiffs' federal tort claims on procedural grounds, those claims cannot be a basis for appellate jurisdiction in a regional court of appeals pursuant to §1295(a)(2). Yet the jurisdictional basis for appeal is governed by the original claims made, not the ultimate disposition of those



claims. *Atari, Inc. v. JS & A Group, Inc.*, 747 F.2d 1422, 1432-36 (Fed. Cir.), *cert. denied*, 106 S.Ct. 1463 (1985).

The court of appeals correctly ruled that plaintiffs "have alleged serious wrongs traditionally compensable at common law," and thus customarily actionable under the Federal Tort Claims Act, 28 U.S.C. §1346(b). *Hohri v. United States*, 782 F.2d at 240, n. 27. The court of appeals affirmed the dismissal of plaintiffs' tort claims only because it ruled that the administrative filing requirement in §2675(a) of the Federal Tort Claims Act was not subject to waiver despite the highly unusual facts in this case. While plaintiffs dispute that holding, the court of appeals' decision clearly recognized the non-frivolous nature of plaintiffs' tort claims.

The Government's jurisdictional argument to this Court is without merit and has already been waived in this case. The jurisdictional issue was noted by the Government and then immediately conceded in the same brief (in favor of plaintiffs). The Government stated, "Here, it is clear that this Court possesses jurisdiction to entertain this appeal even if the Federal Tort Claims Act claims contained in the complaint are not considered to be frivolous." Brief of the Government/Appellee, at p. 62. The court of appeals properly anticipated and identified the position the Government now raises as procedural posturing in the event of an unfavorable ruling.<sup>3</sup> In

<sup>3</sup> On page 24 of the Transcript of Oral Argument before the Court of Appeals, September 24, 1985, the following interchange occurs between Mr. Axelrad, counsel for the Government, and

*Squillacote v. United States*, 747 F.2d 432 (7th Cir.), *cert. denied*, 105 S.Ct. 2021 (1985), similar Government attempts at retrospective forum-shopping were rebuked by the Seventh Circuit, which held that in the name of judicial efficiency and fairness the regional court of appeals had jurisdiction to render judgment in that case, even though §1295(a) would otherwise have required the appeal to go to the Court of Appeals for the Federal Circuit.

The Government relies on *Bray v. United States*, 785 F.2d 989 (Fed. Cir. 1986), to assert that a conflict exists among the courts of appeals as to the proper disposition of "mixed claim" cases under §1295(a). Yet *Bray* was not a mixed claim case, and did not directly rule on that issue. *Accord, United States v. Mottaz*, \_\_\_ U.S. \_\_\_, 54 U.S.L.W. 4641, 4645-46, n. 11 (June 11, 1986). Further, even if there is some ambiguity in §1295(a), this case's highly unusual facts

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Judge Ruth B. Ginsburg:

MR. AXELRAD: I must say that I have addressed the issue of this Court's jurisdiction, despite the fact that it is perhaps the only point on which we agree with the appellants—

QUESTION: For a different reason?

MR. AXELRAD: Yes, for different reasons.

QUESTION: You win only if they lose?

MR. AXELRAD: That is an excellent way of stating our conclusion, because we think that they must lose since the District Court's jurisdiction was not based on the—

QUESTION: If they win on the merits, they lose on jurisdiction; if they lose on the merits, they win on jurisdiction, is that it?

MR. AXELRAD: Your Honor has critically stated our view as applied to the dilemma of plaintiffs' own making.

and historical significance make it a particularly inappropriate vehicle for extensive litigation of jurisdictional issues. Many members of the plaintiff class (including two of the named plaintiffs, Kinnosuke Hashimoto and Theresa Takayoshi) have already died *pendente lite*. In the interests of judicial economy, efficiency, and compassion for prompt judicial redress for plaintiffs, this Court should not countenance an additional round of jurisdictional wrangling on a point the Government has previously conceded.

**II. The court of appeals' application of standard tolling doctrine to the facts of this case was correct and fails to raise a substantial federal question.**

An unrepentant Justice Department has been found by the United States Court of Appeals for the District of Columbia Circuit and various district courts to have misled this Court in the wartime cases.<sup>4</sup> The Government stills continues to assert there were facts compelling the mass racial actions taken against plaintiffs, even though to date it has failed to disclose any such evidence. It is only in the 1980's that plaintiffs found evidence sufficient to rebut the Government's continuing claim of "military necessity," and to overcome the deference to that claim created by this Court's wartime decisions. Now that the fraud has been discovered, the Government says the facts were obvious (although they eluded this Court and legal scholars at the time), and should have been sued on long ago.

<sup>4</sup> *Hohri v. United States*, 782 F.2d 227 (D.C. Cir. 1986); *Korematsu v. United States*, 584 F.Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 627 F.Supp. 1445 (W.D.Wash. 1986), *appeal pending* (9th Cir. No. 86-3853); *Yasui v. United States*, CV-83-151-BE (Order of January 26, 1984, D.Ore.), *appeal pending* (9th Cir. No. 84-3730).

The court of appeals' ruling is consistent with standard tolling doctrine in statute of limitations cases. This Court has historically held limitations periods are tolled where there is active fraud and concealment by the defendant. *Holmberg v. Armbrrecht*, 327 U.S. 392, 396-97 (1946); *Exploration Co. v. United States*, 247 U.S. 435 (1918); *Bailey v. Glover*, 88 U.S. 342, 348 (1875). This equitable rule of tolling is read into every statute of limitations, *Holmberg, supra*. The case most heavily relied upon by the Government, *United States v. Kubrick*, 444 U.S. 111 (1979), does not even address tolling due to fraudulent concealment, and by its own terms does not dictate a result different from that reached by the court of appeals here. See *Hohri v. United States*, 782 F.2d at 249, n. 56.

It is the enormity of the fraud committed that the Government's petition fails to address. The Government blithely asserts: "Like all who have suffered wrongs, respondents had the duty to pursue their claims diligently, and to bring them within the time provided by the statute of limitations." (Government Petition, p. 14.) The Government conveniently ignores the fact that plaintiffs did promptly and vigorously challenge the Government's wartime actions in numerous court actions from 1942 to 1951, including challenges based on the lack of any factual basis of military necessity for their continuing imprisonment and the deprivation of their rights.<sup>5</sup> Yet plaintiffs suf-

<sup>5</sup> See briefs of Petitioners and *amici curiae* (especially the Japanese American Citizens League and the American Civil Liberties Union) before the Supreme Court in the *Korematsu* and *Hirabayashi* cases. See also challenges to the mass racial curfews, *Hirabayashi v. United States*, 46 F.Supp. 657 (W.D. Wash.



ferred devastating losses in those earlier cases, due to the Government's fraud—the same fraud that induced this Court to accept the Government's claims of "military necessity" based on "facts of public notoriety," without any factual record of such necessity. *Hira-*

1942), *aff'd* 320 U.S. 81 (1943); *Yasui v. United States*, 48 F.Supp. 40 (N.D.Ore. 1942), *on remand*, 51 F.Supp. 234 (N.D.Ore. 1942), *modified*, 320 U.S. 115 (1943); *Ex Parte Ventura*, 44 F.Supp. 520 (W.D. Wash. 1942); *habeas corpus*, injunctive actions, and other challenges to the mass and individual exclusion orders against Americans of Japanese ancestry, *Korematsu v. United States*, 140 F.2d 289 (9th Cir. 1942), *aff'd* 323 U.S. 214 (1944); *Ex Parte Lincoln Kanai*, 46 F.Supp. 286 (E.D. Wis. 1942); *Ochikubo v. Bonesteel*, 57 F.Supp. 513 (S.D.Cal. 1944); *Ochikubo v. Bonesteel*, 60 F.Supp. 916 (S.D.Cal. 1945); *habeas corpus* challenges to the mass imprisonment of American citizens without trial, *Ex Parte Mitsuye Endo*, 323 U.S. 283 (1944) (involving two and one half years of delay prior to Supreme Court ruling ordering petitioner's release on statutory interpretation grounds because the Government expressly conceded her loyalty, and in *dicta* continuing to cite with approval the military necessity rationale); challenges to the Government's coerced "renunciations" of American citizenship of Japanese Americans, *Abo v. Clark*, 77 F.Supp. 806 (N. D. Cal. 1948), *modified*, 186 F.2d 766 (9th Cir. 1951), *cert. denied*, 342 U.S. 832 (1951); *Ancheson v. Murakami*, 176 F.2d 953 (9th Cir. 1949); *Inouye v. Clark*, 73 F.Supp. 1000 (S.D. Cal. 1947), *rev'd*, 175 F.2d 740 (9th Cir. 1949); *Murata v. Acheson*, 99 F.Supp. 591 (D.HI. 1951), *rev'd per curiam*, 342 U.S. 900 (1951); *Okimura v. Acheson*, 99 F.Supp. 587 (D.HI. 1951), *rev'd per curiam*, 342 U.S. 899 (1951); *habeas corpus* challenge of internment and deportation following the end of the war, *Ex Parte Zenzo Arakawa*, 79 F.Supp. 458 (D.Pa. 1947); and challenges to convictions for failure to comply with compulsory draft procedures in the camps on the basis mass racial imprisonment was unconstitutional, *Fujii v. United States*, 148 F.2d 298 (10th Cir. 1945); *Takeguma v. United States*, 156 F.2d 437 (9th Cir. 1946); *United States v. Masaaki Kuwabara*, 56 F.Supp. 716 (N.D. Cal. 1944). There were dozens of other unreported cases denying relief in similar challenges.

*bayashi, supra*, at 102. In the subsequent decades plaintiffs continued to seek judicial redress for injuries caused by the Government's wartime actions, but were denied any redress for claims not expressly included in the 1948 American-Japanese Evacuation Claims Act, 50 U.S.C. App. §1981, because of the legal force of *Korematsu*, *Hirabayashi*, and *Yasui, supra*.<sup>6</sup>

Given the repeated decisions of this Court, dozens of lower court decisions, and Claims Act cases directly rejecting plaintiffs' factual position—long after the alleged availability of evidence adverted to by the district court, plaintiffs were reasonable in not seeking to relitigate the issue of military necessity without had a substantively different basis for doing so.<sup>7</sup> Until plaintiffs could overcome the government's anticipated defense of military necessity, they did not have the necessary elements of a legal claim.<sup>8</sup>

<sup>6</sup> See, e.g., *Claim of Mary Sogawa*, in Adjudications of the Attorney General of the United States, Volume I, Precedent Decisions under the American-Japanese Evacuation Claims Act, 1950-1956, pp. 126, 131-33, noting that no rights or remedies other than those specified by statute would be recognized because the Government had not confessed any error as to the military emergency which caused the loss of the properties. *Accord, Mary Sonoda v. United States*, 154 Ct. Cl. 130, 140 (1961).

<sup>7</sup> Indeed, ethical dictates, as now codified in Rule 11, Federal Rules of Civil Procedure, would likely have prohibited an attorney from bringing this action on behalf of plaintiffs in light of the repeated rulings upholding the facts and legality of the government's claims of "military necessity", absent development of substantially different law or facts to support those claims. See, *Homcy v. Resor*, 455 F.2d 1345 (D.C. Cir. 1971); *American Security Vanlines, Inc. v. Gallagher*, 782 F.2d 1056 (D.C. Cir. 1986); *Reliance Insurance Co., v. Sweeney Corp.*, 792 F.2d 1137 (D.C. Cir. 1986).

<sup>8</sup> The fact that the governmental fraud here went to the de-

The court of appeals properly ruled that plaintiffs could not reasonably be expected to bring this action until the legal significance of the Court's rulings in *Korematsu* and *Hirabayashi* was undermined. The Government's reliance on the statute of limitations presupposes a case different from the instant one, which is *sui generis* by virtue of repeated Supreme Court rulings—tainted by the Government's own actions—upholding the Government's defense of military necessity for the wartime actions and thus barring further claims until that defense could successfully be overcome. Only in the early 1980's did the creation and work of the Congressional Commission on War-time Relocation and Internment of Civilians, and the discovery of previously suppressed internal Government memoranda, for the first time provide direct evidence of governmental fraud and concealment before this Court in the wartime cases, as well as the complete lack of any factual support for the Government's claim of "military necessity." Contrary to the Government's exegesis, the court of appeals did not require a confession of error in this case. The mere creation of the CWRIC in 1980 could not and did not have that effect. But what the creation of the CWRIC did do for the first time, was to indicate that something very serious and disturbing may have occurred

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fense of military necessity rather than to an affirmative element of plaintiff's case-in-chief has properly been recognized as a "technical distinction" that is not determinative. After this Court's decisions in *Korematsu* and *Hirabayashi*, an essential element of plaintiffs' claims required their successfully overcoming of the Government's defense of military necessity. *Hohri v. United States*, 586 F.Supp. 769 (D.D.C. 1984), modified, 782 F.2d 227 (D.C. Cir. 1986); *Ware v. United States*, 626 F.2d 1278 (5th Cir. 1980).

in this Country's judicial and legislative processes during the war.

The creation of the CWRIC therefore first undermined the legal significance of the wartime cases. In plaintiffs' view, however, the court of appeals was overly generous to the Government in using the 1980 CWRIC enactment date to start the statute of limitations, because the direct evidence indicating governmental fraud before this Court and the lack of military necessity only came to light in 1982-83, providing the necessary factual predicate for challenging the Government's claim of military necessity.<sup>9</sup>

The Government next argues there was nothing in the wartime cases for plaintiffs to overcome. The Government asserts that neither *Korematsu* nor *Hirabayashi* authorized a taking of plaintiffs' property. But that argument ignores the known effect of the Government's wartime program, as well as the doctrine that there is no Fifth Amendment protection for property rights lost as a result of genuine military necessity. See *Claim of Mary Sogawa, supra*; see also

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<sup>9</sup> The Government's Petition also indirectly brings into question the district court's summary dismissal of this case without an evidentiary hearing on limitations and fraud issues. The district court erred in ordering a dismissal when the jurisdictional issue was so heavily dependent on the facts. Where jurisdiction depends on development of factual issues, jurisdiction should not be denied until the facts are fully heard. *Bell v. Hood*, 327 U.S. 678, 681-83 (1946); *Holmberg, supra*, at 396; *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). There has not yet been an evidentiary hearing on any of the issues presented in this case. In a suit involving statutes of limitations and allegations of fraud, there is a strong presumption against summary dismissal. *Smith v. Nixon*, 606 F.2d 1183, 1190 (D.C. Cir. 1979); *Richards v. Mileski*, 662 F.2d 65, 73 (D.C. Cir. 1981).



*Hohri v. United States*, 782 F.2d at 251, citing *United States v. Caltex*, 344 U.S. 149, 154-56 (1952); *United States v. Pacific Railroad*, 120 U.S. 227, 234 (1887). The Government cannot simultaneously argue there were compelling military reasons for plaintiffs' mass exile and imprisonment (which caused massive losses of property), but seek to avoid Takings claims by arguing that the wartime cases failed to authorize the takings.

Finally, the Government argues that President Ford's 1976 Proclamation<sup>10</sup> revoking wartime Executive Order No. 9066 began the running of the period of limitations. There is no legal merit to the Government's position, which boils down to the assertion that a fraud was concealed for 35 years, and plaintiffs should have known in 1976 that the statute of limitations had started to run although the Government continued to sit on the evidence and reiterate the legal facade (as it does to this day) of military necessity.

The court of appeals held that tolling is appropriate in this case in light of the unprecedented fraud and concealment by the Government. That decision was correct, and there is no substantial federal question

<sup>10</sup> Presidential Proclamation 4417, 3 C.F.R. 1976, Comp., pp. 8-9, was issued on February 19, 1976. The Proclamation failed to give notice of any government fraud and concealment, and instead stated that Executive Order 9066 "was for the sole purpose of prosecuting the war with the Axis powers . . .," thereby reiterating the Government's claim of military necessity. Only the facts discovered in the early 1980's have for the first time shown the Government *knew* the 1942 Order was not for military purposes, and was motivated by racist interests.

or conflict<sup>11</sup> warranting this Court's review of that determination.

## CONCLUSION

*Coram nobis* petitions filed by Messrs. Korematsu, Hirabayashi, and Yasui have recently invalidated their convictions, and brought to light the true facts of the Government's wartime fraud. *Korematsu v. United States*, 584 F.Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 627 F.Supp. 1445 (W.D.Wash. 1986), *appeal pending* (9th Cir. No. 86-3853); *Yasui v. United States*, CV-83-151-BE (Order of January 26, 1984, D.Ore.), *appeal pending* (9th Cir. No. 84-3730). The timeliness of those decisions was affirmed.

It is now time to accord relief to the more than 120,000 other Americans who were confined in the prison camps and deprived of virtually every constitutional and common law right guaranteed to them, solely on the basis of their racial ancestry and the force of this Court's wartime decisions. These innocent Americans have lived an existence of unfair shame, trauma, and economic privation. Many have already died as a result of the hardships inflicted on them. The Government should not be permitted further to shield its unprecedented wrongdoing under

<sup>11</sup> The Government mistakenly (or perhaps hopefully) suggests the District of Columbia Circuit and the Federal Circuit would reach differing results in their application of tolling doctrine. The court of appeals' decision now constitutes the "law of the case," which can not properly be relitigated even if there is a change in appellate tribunals. *Hohri v. United States*, 782 F.2d at 241, n. 31; *Laffey v. Northwest Airlines*, 740 F.2d 1071, 1082 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 939 (1985).

the rubric of the statute of limitations, or a belatedly-raised jurisdictional question.

Respectfully submitted,

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October 24, 1986



# REPLY BRIEF

(3)  
No. 86-510

Supreme Court, U.S.  
**E I L E D**

**NOV 5 1986**

JOSEPH F. SPANOL, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HOHRI, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT**

**REPLY MEMORANDUM FOR THE UNITED STATES**

CHARLES FRIED  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*

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**In the Supreme Court of the United States**

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**REPLY MEMORANDUM FOR THE UNITED STATES**

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In our petition, we showed that the application of 28 U.S.C. 1295(a)(2) to determine the proper appellate forum when a plaintiff brings claims under both the Tucker Act and the Federal Tort Claims Act (FTCA) is an important, difficult, and unsettled question, on which the court below was closely divided, and on which the United States Court of Appeals for the Federal Circuit (which will hear any future appeals in this case) has expressed the opposite view from that taken by the majority below. We also showed that, because the FTCA claim in this case was frivolous, there was no principled basis on which the court below could hold that it had jurisdiction, even on its view that mixed cases may be heard by the regional court of appeals. Finally, we showed that the holding by the court of appeals that the statute of limitations had not run on 120,000 Japanese-American evacuees' Takings Clause claims for losses incurred during World War II, based on the contrived premise that this Court would have held that such claims were barred by "military necessity" until the Presi-

dent or Congress announced that "[the evacuation] had been a *legal* error" (Pet. App. 50a n.67), was so egregiously wrong as to warrant correction by this Court.

Respondents' brief in opposition makes no attempt to analyze the jurisdictional statute or to support—other than by bald assertion (Br. in Opp. 6)—the holding of the court of appeals that their Tort Claims Act claims were not frivolous. Instead, it suggests that we waived the jurisdictional argument that we are now making, and in the process incorrectly describes the course of the proceedings in the court of appeals. Respondents' brief in opposition also offers more rhetoric than legal analysis in response to our statute of limitations argument. We stand by our petition, and add a brief comment in point 2 below.

1. The notion that we did not make in the court of appeals the same jurisdictional argument that we make in this Court can be quickly laid to rest. In our petition, we have urged this Court to consider whether appeals in mixed Tucker Act/FTCA cases lie in the Federal Circuit or in the regional circuit, and we have stated our view that they lie exclusively in the Federal Circuit. We made that argument explicitly in our brief in the court of appeals and in oral argument.<sup>1</sup> Our brief stated (U.S. C.A. Br. 60-62 (emphasis added)):

Plaintiffs' reliance upon the Tucker Act, 28 U.S.C. § 1346(a)(2), not only does not aid them but, instead, raises a question as to this Court's appellate jurisdiction to entertain their appeal. \* \* \*

While the legislative history of the first portion of § 1295 is not conclusive, it suggests that the appellate jurisdiction of the Court of Appeals for the Federal Circuit should [be] construed in accordance with the

<sup>1</sup> We have appended to this reply memorandum pertinent portions of our brief in the court of appeals and of the transcript of argument, so as to place in context the statements that respondents quote.

terms of the statute. *Thus, jurisdiction to entertain an appeal is vested in the Federal Circuit whenever the jurisdiction of the district court is based in whole or in part upon 1346(a)(2) ("the Tucker Act"), even though a claim under § 1346(b) ("the Federal Tort Claims Act") forms the basis for some other portion of the claim. \* \* \**

*\* \* \* [T]he language contained in the second portion of § 1295(a) which excludes from Federal Circuit jurisdiction cases brought in a district court under § 1346(b), should be read as excluding from that court's jurisdiction only those cases in which the jurisdiction of the district court is based exclusively upon § 1346(b). \* \* \**

We repeated this point in oral argument (Tr. 21-22 (emphasis added)):

QUESTION: What kind of proceedings? Suppose we say here is a claim that evokes jurisdiction under the Tucker Act, the Tort Claims Act, and other things, but just say those two, and we think that the plaintiffs properly came to court under both those heads, whether they have established a claim is another question, but for jurisdictional purposes *they properly came to the District Court under both the Tucker Act and the Tort Claims Act, then what do we do?*

MR. AXELRAD: *There are two choices. One would be to dismiss the appeal because it was filed with the wrong court in the light of your inclusion and that would place plaintiffs in the unpalatable position of being so-called hoisted on their own petard, or, second, to exercise the transfer authority which would only be transferred if the interests of justice so desire. The plaintiffs made their choice of appealing to this*

circuit and it would take consideration by this Court in that event to determine whether to exercise transfer authority or —

QUESTION: What about 1295, whichever subsection, that says when jurisdiction is based in whole or in part on the Tucker Act the appeal goes to the Federal Circuit except when you have also got a claim under the Tort Claims Act and then it goes to this Court or the Regional Circuit Court?

MR. AXELRAD: This Court's ruling indicates, as well as the Federal Circuit's ruling, point in the direction of suggesting that *where the Tucker Act claim is within the jurisdiction of the court is non-frivolous, at least, the entire appeal would go to the Federal Circuit and that exclusion of Tort Claims has to be read in that context.*

It is true that, notwithstanding our clearly stated position that the court of appeals could not adjudicate a Tucker Act or mixed Tucker Act/FTCA appeal, we urged the court of appeals to hold that it had jurisdiction — but only if, and because, it accepted our contention that this was not a Tucker Act case at all. In accordance with circuit precedent,<sup>2</sup> we took the position that the court of appeals must determine whether a *valid* Tucker Act claim, free of jurisdictional defects, was stated in order to determine whether the district court's jurisdiction had been "based,

<sup>2</sup> *Van Drasek v. Lehman*, 762 F.2d 1065 (D.C. Cir. 1985); accord, *Shaw v. Gwatney*, 795 F.2d 1351, 1353 (8th Cir. 1986) (court had jurisdiction to reverse district court's award of money under the Tucker Act but would have been required to transfer appeal to Federal Circuit if it agreed with district court that district court had jurisdiction under the Tucker Act); *Sharp v. Weinberger*, 798 F.2d 1521, 1522 (D.C. Cir. 1986) (emphasis added) (although court postulates six alternative criteria for Federal Circuit jurisdiction, "the requirement common to all of them," except those rejected in *Van Drasek*, is "a valid basis for Little Tucker Act jurisdiction").

in whole or in part," on the Tucker Act, as required by 28 U.S.C. 1295(a)(2) for exclusive Federal Circuit jurisdiction.

We also took the position that the Tucker Act claims in this case suffered from two jurisdictional defects: that they were barred by the statute of limitations, and that they were barred by the existence of a different, exclusive remedy (the Japanese-American Evacuation Claims Act of 1948, 50 U.S.C. (& Supp. II) App. 1981-1987).<sup>3</sup> The logical implication of this position was that the court of appeals had jurisdiction to affirm dismissal of the Tucker Act claims but not to reverse on the ground that respondents had stated a jurisdictionally valid Tucker Act claim, and respondents could not "win" in the D.C. Circuit on their Tucker Act claims. Concomitantly, according to our position before the panel, the Federal Circuit would have had jurisdiction to reverse on the ground that a valid Tucker Act claim had been stated but not to affirm the dismissal of the Tucker Act claims, and respondents could not have "lost" in the Federal Circuit if they had taken their appeal there. That, not "procedural posturing in the event of an unfavorable ruling" (Br. in Opp. 6), is the meaning of the colloquy from oral argument quoted in footnote 3 of respondents' brief in opposition.

Thus, at all times, we took the position that, if this case is treated as one raising a Tucker Act claim, the Federal Circuit has exclusive jurisdiction. The case has in fact been

<sup>3</sup> Before the panel rendered its decision, we filed a supplemental memorandum abandoning the argument that the running of the statute of limitations meant that the district court's jurisdiction could not have been based on the Tucker Act, but reasserting that the existence of an exclusive remedy, the Evacuation Claims Act, meant that the district court's jurisdiction could not have been based on the Tucker Act; accordingly, in our supplemental memorandum, we continued to urge the court of appeals to hold that it had jurisdiction — but only if, and because, it agreed with us as to the exclusivity of the Evacuation Claims Act.



treated as a Tucker Act case, and therefore our position is—and has been all along—that the court of appeals lacked jurisdiction to decide the case as it did.<sup>4</sup> The Court should grant certiorari to resolve the important jurisdictional question posed by our petition.

2. Respondents devote most of their brief in opposition to decrying the government's alleged fraud on this Court—citing conduct that, in our view, cannot fairly be

<sup>4</sup> Our present position does differ from the view we expressed before the panel, in that we now believe that the court of appeals also lacked jurisdiction to affirm the district court's dismissal of the Tucker Act claims. Despite the circuit precedent supporting this position, we no longer believe that a court of appeals should inquire into the validity of a Tucker Act claim—beyond determining whether it is frivolous—before deciding whether the jurisdiction of the district court was based, in whole or in part, on the Tucker Act. Our change of position resulted not from anything that happened in the present case, but as a result of further consideration of the issue in connection with *Pacyna v. Marsh*, remanded, No. 84-1706 (Jan. 21, 1986).

In July 1985 (months before *Hohri* was decided), we argued in our brief in opposition in *Pacyna* that the Federal Circuit has exclusive jurisdiction to review a district court determination that the statute of limitations has run on a Tucker Act claim. We made that argument in *Pacyna* even though we had prevailed on the merits in the regional court of appeals.

After filing our brief in opposition in *Pacyna*, we realized that the position that the Solicitor General was taking before this Court was inconsistent with the position that the government was taking before the courts of appeals. See, e.g., *Bray v. United States*, 785 F.2d 989, 992 (Fed. Cir. 1986) (rejecting our position that the running of the statute of limitations is a “jurisdictional” defect in a Tucker Act claim that precludes the Federal Circuit from exercising appellate jurisdiction). We eventually decided that our position in *Pacyna* was correct, and we have, since late 1985, attempted to assure that the government consistently asserts that the Federal Circuit does not lose its exclusive jurisdiction to review disposition of a Tucker Act claim just because the district court dismisses the claim as time barred—a position apparently adopted by this Court in *Pacyna* (order of Jan. 21, 1986) and explicitly adopted by the Federal Circuit in *Bray* and in *Hurick v. Lehman*, 782 F.2d 984 (1986).

described as fraud and in any case was not the cause of this Court's rulings in *Korematsu v. United States*, 323 U.S. 214 (1944), and *Hirabayashi v. United States*, 320 U.S. 81 (1943), which were based, rightly or wrongly, on “facts of public notoriety” (320 U.S. at 102; see Pet. 18-19 & n.23). The district court, as respondents emphasize (Br. in Opp. 3), credited their claims of fraud, yet it applied traditional fraudulent concealment doctrine and held that the fraud tolled the statute of limitations only until respondents could have, with due diligence, discovered the facts concealed. Respondents offer no legal analysis to support the remarkable reversal of that ruling by the court of appeals on the ground that neither the President nor Congress had confessed “legal error” until 1980 (Pet. App. 50a n.67).<sup>5</sup>

Respondents do claim that their unsuccessful litigation after the relevant facts came to light demonstrates that the statute of limitations was still tolled (Br. in Opp. 9-11 & nn.5-6). There are at least two reasons why that position, which was not the position of the court of appeals, is altogether untenable. First and foremost, respondents cite no action in which they invoked the Takings Clause as a basis for a claim for compensation.<sup>6</sup> As we showed in our

<sup>5</sup> Indeed, in complete contradiction to the theory of the court of appeals, respondents expressly concede that “[t]he mere creation of the CWRIC in 1980 could not and did not have th[e] effect” of a confession of legal error (Br. in Opp. 12; accord, Pet. 16 n.20).

<sup>6</sup> Only one case offered by respondents—cited in footnote 6 of their brief in opposition—touched at all on the relationship between the validity of the evacuation and claims for compensation. *Claim of Mary Sogawa*, 1 Adjudications of the Att’y Gen., Precedent Decisions Under the Japanese-American Evacuation Claims Act 126, 132-133 (1950). All that that decision said was that Congress, like this Court, had Members with divergent views as to the “military necessity” justification for the evacuation, and that the Evacuation Claims Act as eventually enacted did not reflect a congressional determination that the evacuation had been an actionable wrong. Neither that case

petition (at 19-22), it is extremely unlikely that such a claim would have been held to be barred by "military necessity," even assuming that this Court would have continued to hold that the evacuation had been justified by "military necessity." Any remote possibility that this Court would have held the claims barred is hardly a sufficient basis for a holding that respondents—who by their own assertion were litigious—were excused from even *trying* to bring a Takings Clause claim within the period set by the statute of limitations.

Even ignoring that insurmountable barrier to respondents' argument, there is no basis in law or logic for the proposition that the unsuccessful litigation of claims at a time after "fraudulently concealed" information was revealed tolls the statute of limitations for an additional period. The unsuccessful claims show only that the claimants did not gather evidence sufficient to induce the courts to rule in their favor—either because they did not exercise due diligence in finding that evidence or because the "fraudulently concealed" evidence, once presented, was not sufficient to persuade the courts on the merits. A decades-long tolling of the statute of limitations does not follow just because a litigant has been unsuccessful.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED  
*Solicitor General*

NOVEMBER 1986

nor *Sonoda v. United States*, 154 Ct. Cl. 130 (1961), even mentioned the Takings Clause, and the cases hardly demonstrate that this Court (or any other) would have rejected a Takings Clause claim.

## APPENDIX

### Pertinent Portions of Brief Filed on Behalf of the United States in the Court of Appeals (at 60-63)

Plaintiffs' reliance upon the Tucker Act, 28 U.S.C. § 1346(a)(2), not only does not aid them but, instead, raises a question as to this Court's appellate jurisdiction to entertain their appeal. The exclusive jurisdiction is defined in the first portion of 28 U.S.C. § 1295(a)(2) ("section 1295") to include "an appeal from a final decision from a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, . . . ." The second portion of section 1295 provides, however, that the jurisdiction of the Federal Circuit shall not extend to ". . . an appeal in a case brought in a district court under . . . 1346(b) . . . [which] shall be governed by sections 1291, 1292, and 1294 of this title." 28 U.S.C. § 1295(a)(2). Since plaintiffs rely in part upon 28 U.S.C. § 1346(a)(2), the first portion of § 1295 could be construed to give the United States Court of Appeals for the Federal Circuit exclusive jurisdiction over this appeal. However, since the plaintiffs also rely upon § 1346(b), the express exclusion of appeals in cases brought under § 1346(b) contained in the second portion of section 1295(a)(2), might be deemed as intended to permit this action to proceed in this Court.

While the legislative history of the first portion of § 1295 is not conclusive, it suggests that the appellate jurisdiction of the Court of Appeals for the Federal Circuit should be construed [*sic*] in accordance with the terms of the statute. Thus, jurisdiction to entertain an appeal is vested in the Federal Circuit whenever the jurisdiction of the district court is based in whole or in part upon 1346(a)(2) ("the Tucker Act"), even though a claim under § 1346(b) ("the Federal Tort Claims Act") forms the basis for some other portion of the claim. This conclusion is

(1a)



valid at least in the situation in which the Tucker Act claim is not premised upon "[i]mmaterial, inferential, and frivolous allegations." This latter type of allegation "will not create jurisdiction in the lower court, and therefore there will be no jurisdiction over these questions in the appellate court" for the Federal Circuit. S. Rept. 97-275, 97th Cong., 2d Sess., reprinted in U.S. Code Cong. and Admin. News at 29 (1982). See, *Atari Inc. v. JS&A Group, Inc.*, Fed. Cir. No. 84-742 (Nov. 8, 1984); but see, *Squillacote v. United States*, 7th Cir. No. 83-1882 (Nov. 2, 1984) (denying rehearing).

In contrast, the language contained in the second portion of § 1295(a) which excludes from Federal Circuit jurisdiction cases brought in a district court under § 1346(b), should be read as excluding from that court's jurisdiction only those cases in which the jurisdiction of the district court is based exclusively upon § 1346(b). This interruption [*sic*: interpretation] of this language would render § 1295(a)(2) in accord with § 1295(a)(1) which confers jurisdiction upon the Federal Circuit to entertain appeals in cases in which the jurisdiction of the district court was based in whole or in part upon 28 U.S.C. § 1338 unless the case involves a claim relating to copyrights "and no other claims."

Here, it is clear that this Court possesses jurisdiction to entertain this appeal even if the Federal Tort Claims Act claims contained in the Complaint are not considered to be frivolous. Section 1295 confers jurisdiction upon the Federal Circuit only if the jurisdiction of the district [court] is based in whole or in part upon 28 U.S.C. § 1346(a). Here, the district court correctly held that the statute of limitations barred any possible claim under the Tucker Act and, accordingly, the district court dismissed the action for lack of jurisdiction. Since the jurisdiction of the district court was not based in whole or in part upon 28

U.S.C. § 1346(a), within the meaning of the first portion of § 1295, it follows that this Court possesses jurisdiction to entertain this appeal.

**Pertinent Portions of Transcript of Oral  
Argument Before the Court of Appeals (at 20-25)**

**ORAL ARGUMENT OF JEFFREY AXELRAD, ESQ.,  
ON BEHALF OF APPELLEES**

MR. AXELRAD: Thank you. Turning to Judge Markey's question about the appellate jurisdiction of this Court, it is the point on which we agree with appellants as to the result reached. We believe this Court does have appellate jurisdiction because the District Court jurisdiction was not based on the Tucker Act. Indeed, the District Court did not have jurisdiction under the Tucker Act.

QUESTION: Isn't the test whether the complaint alleges jurisdiction based on the Tucker Act and not the court's ultimate findings?

MR. AXELRAD: No, Your Honor —

QUESTION: The ruling was that the District Court did think that it was under the Tucker Act, its rules the claim out on the basis of time bar?

MR. AXELRAD: Turning to the first prong of your question, Your Honor, the Andrasic [*sic*: *Van Drasek*] decision from this circuit construed the jurisdictional provision to mean that there must be jurisdiction based on the Tucker Act in the sense that the legal requirement of jurisdiction are met.

For instance, if a complaint is filed and alleges \$20,000 in damages and also alleges that the Tucker Act provides District Court jurisdiction, the District Court dismisses that action. It would appear under Andrasic [*sic*] that the appeal from that decision would go to the Regional Circuit, rather than to the Federal Circuit, because the jurisdiction is not based on the Tucker Act. The elements of the Tucker Act as outlined in Andrasic [*sic*] include the



\$10,000 limit on District Court jurisdiction. Similarly, here the District Court correctly held that because of a general statute of limitations there could be no Tucker Act jurisdiction here.

We also believe that the District Court, since it misconstrued the reach of the Tucker Act—and on that point we disagree with the District Court—could not have—

QUESTION: Well, let's say this is true and we find that there is indeed jurisdiction under the Tucker Act, would you then say that the appeal is in the wrong place? We recognize that the plaintiffs have a claim under the Tucker Act, under the Tort Claims Act.

MR. AXELRAD: If the Court were to hold that there is jurisdiction under the Tucker Act, contrary to our argument, there would be something of a logical dilemma, but clearly it would require further proceedings. The question would then—

QUESTION: What kind of proceedings? Suppose we say here is a claim that evokes jurisdiction under the Tucker Act, the Tort Claims Act, and other things, but just say those two, and we think that the plaintiffs properly came to court under both those heads, whether they have established a claim is another question, but for jurisdictional purposes they properly came to the District Court under both the Tucker Act and the Tort Claims Act, then what do we do?

MR. AXELRAD: There are two choices. One would be to dismiss the appeal because it was filed with the wrong court in the light of your inclusion and that would place plaintiffs in the unpalatable position of being so-called hoisted on their own petard, or, second, to exercise the transfer authority which would only be transferred if the interests of justice so desire. The plaintiffs made their

choice of appealing to this circuit and it would take consideration by this Court in that event to determine whether to exercise transfer authority or—

QUESTION: What about 1295, whichever subsection, that says when jurisdiction is based in whole or in part on the Tucker Act the appeal goes to the Federal Circuit except when you have also got a claim under the Tort Claims Act and then it goes to this Court or the Regional Circuit Court?

MR. AXELRAD: This Court's ruling indicates, as well as the Federal Circuit's ruling, point in the direction of suggesting that where the Tucker Act claim is within the jurisdiction of the court is non-frivolous, at least, the entire appeal would go to the Federal Circuit and that exclusion of Tort Claims has to be read in that context.

QUESTION: It wouldn't be excluded, would it? As the Federal Circuit has said a number of times, it would apply the laws of the circuit in Tort Claims or any other area of jurisdiction on which they had no exclusive jurisdiction, right?

MR. AXELRAD: Yes, Your Honor.

QUESTION: So it wouldn't be thrown out.

MR. AXELRAD: That's correct.

\* \* \* \* \*

I must say that I have addressed the issue of this Court's jurisdiction, despite the fact that it is perhaps the only point on which we agree with the appellants—

QUESTION: For a different reason?

MR. AXELRAD: Yes, for different reasons.

QUESTION: You win only if they lose?

MR. AXELRAD: That is an excellent way of stating our conclusion, because we think that they must lose since the District Court's jurisdiction was not based on the—

QUESTION: If they win on the merits, they lose on jurisdiction; if they lose on the merits, they win on jurisdiction, is that it?

MR. AXELRAD: Your Honor has critically stated our view as applied to the dilemma of plaintiffs' own making.

\* \* \* \* \*

We don't believe—and I move down the line quite a bit—the District Court correctly construed the reach of the Tucker Act, and we don't believe the District Court should have considered the Tucker Act at all, because the Japanese-American Evacuation Claims Act of 1948 plainly covers the territory of property damage claims of all sorts, and that exclusive remedy, a very comprehensive measured statute, which did include exclusions which we believe covered the waterfront and barred any other avenue of relief in court for the plaintiffs, at least was exclusive for the kinds of claims that would otherwise be encompassed within the Tucker Act.

# **JOINT APPENDIX**



No. 86-510

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Supreme Court, U.S.  
FILED

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CLERK

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**JOINT APPENDIX**

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PETITION FOR A WRIT OF CERTIORARI  
FILED SEPTEMBER 26, 1986  
CERTIORARI GRANTED NOVEMBER 17, 1986

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# **In the Supreme Court of the United States**

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## **JOINT APPENDIX**

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

\_\_\_\_\_  
No. 84-5460

WILLIAM HOHRI, ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA  
\_\_\_\_\_

**RELEVANT DOCKET ENTRIES**

Date	Filings—Proceedings
(B) 07-24-84	Copy of notice of appeal and docket entries from Clerk, DC (n-2)
(B) 07-24-84	Docketing fee was paid in the District Court on 07-12-84
(B) 07-24-84	Docketing statement was mailed to counsel for appellants
(J) 08-10-84	4-Appellants' docketing statement (m-10)
(V) 08-15-84	Clerk's order that a briefing schedule is set as follows: Appellant(s) brief and appendix - 10/12/84; Appellee(s) brief - 11/13/84; Appellant(s) reply brief - 11/27/84. The Clerk shall include this case in the pool of cases available for selection on this Court's January, 1985 calendar
(J) 10-12-84	15-Appellants' brief (p-12) BIN 23-7
(J) 10-12-84	7-Joint appendix (p-12)
(J) 10-12-84	4-Motion of Japanese American Citizens League for leave to file brief amicus curiae (m-12)

Date	Filings—Proceedings
(J) 10-12-84	4-Motion of Japanese American Citizens League for leave to lodge affidavit and Supreme Court brief for the Court's convenience (m-12)
(J) 10-17-84	4-Appellee's opposition to motion of Japanese American Citizens League for leave to lodge an affidavit and Supreme Court brief and response to motion for leave to file brief amicus curiae (m-17)
(J) 10-22-84	4-Appellants' reply to appellee's opposition to motion of Japanese American Citizens League for leave to lodge affidavit and Supreme Court brief (m-19)
(V) 10-25-84	Order per Acting CJ Wright that the motion for leave to participate as amicus curiae is granted and the Clerk is directed to file the lodged brief of JACL; and that the motion of JACL for leave to lodge an affidavit and a brief is referred for consideration to the panel of the Court to be assigned to consider this case on the merits
(V) 10-25-84	15-Amicus curiae's (JACL) brief (m-12)
(J) 10-25-84	Letter dated 10-24-84 from Chief Deputy Clerk to George Tim Gojio, counsel for (JACL), advising that he must be a member of the Bar of this Court or an attorney who is a members to submit his/her appearance as co-counsel before any further submissions can be accepted for filing
(J) 11-13-84	4-Appellee's motion for leave to file motion to extend time to file brief (m-13)
(J) 11-30-84	4-Appellants' motion for substitution of parties (m-30)

Date	Filings—Proceedings
(V) 12-07-84	Clerk's order that the motion to extend briefing time is granted; and the briefing schedule is revised as follows: Appellee(s) brief ** - 11/27/84; Appellant(s) reply brief - 12/14/84. This disposition will affect the calendaring of the instant case and the Clerk shall include the instant case in the pool of cases available for selection on the Court's February, 1985 calendar (leave to file this instant motion is hereby granted; the Clerk is directed to file the lodged brief of appellee)
(V) 12-07-84	4-Appellee's motion for extension of time - per above order
(V) 12-07-84	15-Appellee's brief (m-27)
(J) 12-14-84	15-Appellants' reply brief (m-14)
(V) 12-19-84	Clerk's order that further consideration of the motion for substitution of parties is deferred pending the receipt of additional information. The additional submission should set forth, inter alia, the status of the estates of the deceased parties, the existence of personal representatives, if any, and the position taken by the representatives on this motion
(R) 03-05-85	4-Letter from counsel for appellees' advising of additional authorities pursuant to FRAP 28(j) (m-1) [FR]
(R) 03-19-85	Letter from Chief Deputy Clerk stating that the records of this office do not reflect the submission of the additional information
(J) 03-29-85	4-Appellants' response to court order of 12-19-84 (m-29) (13)
(E) 04-12-85	Clerk's order granting motion of appellants for substitution of parties, and Tim and Cathy Takayoshi are hereby substituted as parties appellant for Theresa and Tomeu Takayoshi.

Date	Filings—Proceedings
(R) 07-31-85	4-Appellant's motion to substitute parties as appellant (m-31) [8]
(T) 08-06-85	Per Curiam order denying the motion of amicus curiae for leave to lodge "Affidavit of Mike Masaoka" and granting the motion of amicus curiae for leave to lodged Supreme Court Brief in Fred Toyosaburo Korematsu v. USA. This motion was presented to and ruled upon by the panel scheduled to hear oral argument on 9/24/85.
(T) 08-06-85	4-Supreme Court Brief in Fred Toyosaburo Korematsu v. USA - LODGED PER ABOVE ORDER
(R) 08-09-85	Letter from Clerk #3 to counsel for appellant returning original affidavit of Mike Masaoda pursuant to 8/6/85 order
(R) 08-12-85	4-Letter from counsel for appellee advising of additional authorities pursuant to FRAP 28(j) (m-8) [8]
(R) 08-14-85	4-Letter from counsel for appellant requesting a certain amount of time be scheduled for oral arguement (m-13) [8]
(E) 08-16-85	Per curiam order that appellants' motion for substitution of parties is granted and Rentaro Hadhimoto is hereby substituted in place of Kinnoshuke Hashimoto and the Clerk is directed to note the docket accordingly. This motion was presented to, and ruled upon by, the panel scheduled to hear oral argument on September 24, 1985. Circuit practice prohibits revealing panel members at this time.
(G) 08-22-85	Certified Original Record (2) volumes and (1) volume of transcript under separate cover [Bin F-2]

Date	Filings—Proceedings
(E) 08-23-85	Clerk's order that appellants' request for one hour for each side for the oral argument is denied. The following times are allotted for oral argument: Appellants—30 minutes and Appellee—30 minutes. This letter was presented to, and ruled upon by, the panel scheduled to hear oral argument on September 24, 1985. Circuit practice prohibits revealing panel members at this time.
(E) 09-12-85	4-Letter from counsel for appellants advising of additional authorities pursuant to FRAP 28(j) (m-11) [8]
(E) 09-24-85	Argued before Wright and Ginsburg, CJs, and Markey, Chief Judge, USCA for the Federal Circuit. [INACTIVE BIN NO. 62-5]
(T) 11-12-85	4-Oral Argument Transcript [8]
(E) 01-07-86	4-Appellee's motion for leave to file a supplemental memorandum regarding appellate jurisdiction (m-7) [#8]
(T) 01-16-86	4-Appellants' opposition to motion for leave to file supplemental memorandum (m-16)
(E) 01-17-86	Per curiam order granting appellee's motion for leave to file supplemental memorandum regarding appellate jurisdiction and the Clerk is directed to file appellee's lodged supplemental memorandum. Wright and Ginsburg, CJs, and Markey, CJ, USCA for the Federal Circuit.
(E) 01-17-86	15-SUPPLEMENTAL MEMORANDUM OF APPELLEE'S (FED) REGARDING APPELLATE JURISDICTION
(D) 01-21-86	Opinion for the Court filed by Circuit Judge Wright.



Date	Filings—Proceedings
(D) 01-21-86	Dissenting opinion filed by Chief Judge Markey.
(D) 01-21-86	Judgment by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed in part and reversed and remanded in part, in accordance with the Opinion for the Court filed herein this date.
(D) 01-21-86	Mandate order.
(D) 01-28-86	Per Curiam, order, on its own motion, that the opinion for the court filed by Circuit Judge Wright on January 21, 1986 be, and hereby is amended. (SEE ORDER FOR DETAILS).
(D) 02-03-86	4-Appellants' bill of costs. (m-9) [9]
(D) 02-12-86	Per Curiam order, sua sponte, that the Dissenting Opinion filed by Judge Markey on January 21, 1986 be, and hereby is amended. (SEE ORDER FOR DETAILS).
(H) 03-07-86	15-Appellees' petition for rehearing and suggestion for rehearing en banc (m-7) [1]
(E) 05-30-86	Per curiam order denying appellee's petition for rehearing. Wright and Ginsburg, CJs, and Markey, USCJ for the Federal Circuit.
(E) 05-30-86	Per curiam order, en banc, denying appellee's suggestion for rehearing en banc. CJ Robinson, Wright, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia, Starr, Silberman and Buckley, CJs. Bork, Scalia, Starr, Silberman and Buckley, CJs, would grant the suggestion for rehearing en banc. (See attached statements.)
(D) 06-13-86	Order filed May 30, 1986 with attached statements released today in printed form.

Date	Filings—Proceedings
(D) 06-26-86	MANDATE ISSUED. Costs are awarded to William Hohri, et al. in the amount of \$754.02 and taxed against United States of America.
(E) 09-15-86	Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed on August 26, 1986 in SC No. 86-298. [#1]
(E) 08-15-86	Notice from Clerk, Supreme Court that an extension of time to file a petition for a writ of certiorari was granted to and including September 27, 1986 in SC No. A-98.
(R) 10-10-86	Notice from Clerk, SC advising that a petition for writ of certiorari was filed in SC #86-510 on 09-26-86 [1]
(R) 11-20-86	Letter from Clerk, SC advising that petition for writ of certiorari was granted on 11-17-86 in SC #86-510 [1]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

No. 83-0750

OBERDORFER, J.  
WILLIAM HOHRI, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

RELEVANT DOCKET ENTRIES

Date	Nr.	Proceedings
1983		
Mar 16	1	COMPLAINT; appearance; jury demand; exhibits A thru N.
Mar 16		SUMMONS (2) issued.
Mar 30	2	AFFIDAVIT OF SERVICE of summons and complaint upon the U. S. Attorney by serving Anne Cahill on 3-16-83.
Mar 30	3	AFFIDAVIT OF SERVICE of summons and complaint upon the Attorney General by serving Edna McCollum on 3-16-83.
May 16	4	MOTION by deft. to dismiss; memorandum in support; table of contents; table of cases; table of authorities.
May 25	5	STIPULATION AND ORDER filed 5-25-83 granting pltf. an enlargement of time to and including July 15, 1983 to file opposition to

Date	Nr.	Proceedings
1983		
		deft's motion to dismiss; and granting deft. an enlargement of time of twenty (20) days following court's disposition of motion to dismiss to respond to pltf's motion for class certification. (N) OBERDORFER, J.
Jun 14	6	MOTION by pltffs. for class action certification; memorandum of P&A's.
July 15	7	OPPOSITION by pltf to motion to dismiss; Table of Contents; Table of Cases and Authorities; P&A's; Exhibit A.
Jul 22	8	CONSENT MOTION by pltffs. for rescheduling of oral argument; memorandum of P&A's.
Jul 25	9	ORDER filed 7-18-83 setting hearing on deft's motion to dismiss on 9-9-83 at 10:00 a.m.; and directing deft's reply brief be filed by 9-2-83. (N) OBERDORFER, J.
Jul 29	10	ORDER filed 7-29-83 extending time until 9-9-83 for deft. to file reply memorandum; and rescheduling hearing on deft's motion to dismiss for 9-30-83 at 10:00 a.m. (Signed 7-28-83) (N) OBERDORFER, J.
Aug 8	11	NOTICE by pltffs. of amended complaint; memorandum of P&A's.
Aug 8	12	AMENDED COMPLAINT by pltffs.; Exhibits A-Q.
Aug 10	13	MOTION (renewed) by deft. to dismiss; memorandum in support.
Aug 22	14	ORDER setting status conference on 9-12-83 at 9:30 a.m. for purpose of scheduling an alternate date for arguments on motion to dismiss. (signed 8-17-83) (N) OBERDORFER, J.

Date	Nr.	Proceedings
1983		
Aug 22	15	STATEMENT by pltffs. of Points & Authorities in opposition to deft's renewed motion to dismiss.
Sep 9	16	NOTICE by deft. of filing of reply to pltfs' opposition to motion to dismiss; attachment.
Sep 30		MOTION by deft. to dismiss, heard, argued and taken under advisement. (Rep. T. Dourian) OBERDORFER, J. (ml)
Oct 7	17	LETTER dated 10-5-83 to Judge Oberdorfer from Benjamin L. Zelenko enclosing a copy of the Government's response and motion under L.R. 220.6 (fiat) OBERDORFER, J. (ml)
Nov 21	18	LETTER dated 11-14-83 to Judge Oberdorfer from Benjamin L. Zelenko re: Korematsu case. (fiat) "Let this be filed." OBERDORFER, J. (ml)
Nov 30	19	LETTER dated 11-28-83 from Benjamin L. Zelenko, Esq. and attachment. (fiat) OBERDORFER, J. (ml)
Dec 13	20	ORDER directing parties to advise Court on or before 1-20-84 with appropriate affidavits and briefs when pltfs. should have discovered the facts evidenced by the published documents and also state what other specific items of evidence, if any, were required before pltfs. could form a responsible complaint and when pltfs. obtained these particular items of evidence or could have reasonably been expected to obtain them. (N) OBERDORFER, J. (ml)
1984		
Jan 20	21	SUPPLEMENTAL MEMORANDUM by pltffs. on the statute of limitations; Exhibits A-J. (ml)

Date	Nr.	Proceedings
1984		
Jan 26	22	MEMORANDUM by deft. in response to the Court's 12-13-83 order; Appendix A-E. "Let this be filed." (fiat) (signed 1-25-84) OBERDORFER, J. (ml)
Feb 1	23	NOTICE by pltf. of filing a page which was inadvertently deleted from pltf's supplemental memorandum on the statute of limitations; attachment. (ml)
Feb 7	24	REPLY by deft. to pltfs' supplemental memorandum on the statute of limitations; table of contents; table of cases. (ml)
Feb 24	25	RESPONSE by pltffs. to deft's reply memorandum on the statute of limitations; Exhibit A. (ml)
May 8	26	LETTER dated 4-24-84 to Judge Oberdorfer informing the Court of the written opinion in <i>Korematsu v. United States</i> copy of which is attached; "Let this be filed." OBERDORFER, J. (ml)
May 14	27	LETTER dated 5-8-84 from Jeffrey Axelrad, Esq. (fiat 5-11-84) OBERDORFER, J. (ml)
May 18	28	MEMORANDUM filed 5-17-84. (N) OBERDORFER, J. (ml)
May 18	29	ORDER filed 5-17-84 granting deft's motion to dismiss, and dismissing complaint. (N). OBERDORFER, J. (ml)
Jul 12	30	NOTICE OF APPEAL by pltffs. William Hohri, et al., from order of May 18, 1984. \$5.00 filing fee and \$65.00 docketing fee paid and credited to U.S. Copies mailed to Ellen Godbey Carson, Esq. and Jeffrey Axelrad, Esq. (dc)



Date	Nr.	Proceedings
1984		
Jul 16		COPY of docket entries, notice of appeal transmitted as preliminary record to USCA. (USCA No. 84-5460). (dc)
Oct 1	31	TRANSCRIPT OF PROCEEDINGS of 9/30/83; pages 1-42; Rep: T. Dourian (ef)

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5460

WILLIAM HOHRI, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

Appeal from the United States District Court  
for the District of Columbia  
(D.C. Civil Action No. 83-750)

Argued September 24, 1985

Decided January 21, 1986

*Benjamin L. Zelenko*, with whom *B. Michael Rauh* and *Ellen Godbey Carson* were on the brief, for appellants.

*Jeffrey Axelrad*, Attorney, Department of Justice, with whom *Richard K. Willard*, Acting Assistant Attorney General, and *Joseph E. diGenova*, United States Attorney, were on the brief, for appellee.

*George Timothy Gojio* was on the brief for *amicus curiae* Japanese American Citizens League, urging reversal.

Before *WRIGHT* and *GINSBURG*, *Circuit Judges*, and *MARKEY*,\* *Chief Judge*, United States Court of Appeals for the Federal Circuit.

\* Sitting by designation pursuant to 28 U.S.C. § 291(a) (1982).

## OPINION OF THE COURT

Opinion for the court filed by *Circuit Judge* WRIGHT.

Dissenting opinion filed by *Chief Judge* MARKEY.

WRIGHT, *Circuit Judge*: In the spring of 1942 the government of the United States forcibly removed some 120,000 of its Japanese-American citizens from their homes and placed them in internment camps. There they remained for as long as four years. When the constitutionality of this action was challenged in the Supreme Court the government justified its actions on the grounds of "military necessity." The Supreme Court deferred. Nearly forty years later, a congressional commission concluded that the government's asserted justification was without foundation. It is now alleged that this fact was concealed from the Supreme Court when it rendered its historic decision in *Korematsu v. United States*. Yet today, now that the truth can be known, the government says that the time for justice has passed. We cannot agree.

This suit was brought by nineteen individuals, former internees or their representatives, against the United States.<sup>1</sup> They seek money damages and a declaratory judgment on twenty-two claims, based upon a variety of constitutional violations, torts, and breach of contract and fiduciary duties. The United States moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). In support of its motion the United States cited the applicable statutes of limitations,

<sup>1</sup> Although appellants had moved for class certification, a decision on this motion was postponed pending resolution of appellee's motion to dismiss. In their motion appellants defined the class as the approximately 120,000 citizens and permanent residents, and representatives of such persons no longer living, who were subjected to the evacuation and internment program. See *Hohri v. United States*, 586 F.Supp. 769, 772 n.1 (D. D.C. 1984) (*Hohri*). Because the District Court granted appellee's motion to dismiss, it never ruled upon the class certification motion.

sovereign immunity, and the alleged exclusivity of the American-Japanese Evacuation Claims Act. The District Court granted appellee's motion to dismiss. *Hohri v. United States*, 586 F. Supp. 769 (D. D.C. 1984) (*Hohri*). We now affirm in part and reverse in part, remanding the Takings Clause claims of those appellants who never received awards under the Claims Act for further proceedings.

## I. BACKGROUND

### A. *Exclusion and Internment*

In the wake of Pearl Harbor the United States immediately took steps to improve security on the West Coast. Initially, attention focused on the activities of Japanese nationals. See Proclamation No. 2525, 6 Fed. Reg. 6321 (1941). Internment of these "enemy aliens" began at once. These precautions, however, did not satisfy the Commanding General of the Western Defense Command, Lt. General John L. DeWitt. In his *Final Recommendation of the Commanding General, Western Defense Command and Fourth Army, to the Secretary of War* (Feb. 14, 1942) (*Final Recommendation*), he urged the evacuation of all Japanese American citizens from the Pacific coast. Joint Appendix (JA) 109-110. DeWitt reasoned:

The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized", the racial strains are undiluted \* \* \*. There are indications that these [Japanese-Americans] are organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.

*Final Recommendation*, JA 109.

On February 18, 1942 DeWitt received legal authority to carry out his policy of racial exclusion. On that date

the President signed Executive Order 9066, authorizing the Secretary of War or his designees to prescribe "military areas" from which any person could be excluded. 7 Fed. Reg. 1407, JA 112.<sup>2</sup> DeWitt designated California, western Oregon and Washington, and southern Arizona as "military areas." In so doing, he declared that all persons of Japanese ancestry were to be excluded from these areas. At first, relocation proceeded on a voluntary basis.<sup>3</sup> When this proved inefficient, compulsion replaced exhortation.

The evacuees were given as little as forty-eight hours notice of their impending removal. They were allowed to bring only what they could carry.<sup>4</sup> In the assembly centers—racetracks and fairgrounds—the evacuees were placed in mass barracks housing 600 to 800 people. Beginning in May 1942 they were transferred to permanent relocation centers: camps surrounded by barbed wire and guarded by military police. They were housed one or two families to a tar-paper room. They ate and bathed in mass facilities.

The majority of the evacuees remained in these camps for the duration of the war.<sup>5</sup> According to the Commis-

<sup>2</sup> Congress subsequently authorized the arrest, fine, and imprisonment of anyone violating an order issued pursuant to Executive Order 9066. See Pub. L. No. 503, 56 Stat. 173, 77th Cong., 2d Sess. (1942).

<sup>3</sup> Executive Order 9066 did not establish means of administering the evacuation. This defect was cured when the President issued Executive Order 9102, 7 Fed. Reg. 2165 (March 20, 1942), creating the War Relocation Authority (WRA).

<sup>4</sup> The government did not take title to the evacuee's property. It offered to take custody of such property, Civilian Exclusion Order No. 5, April 1, 1942, JA 114, or to facilitate its sale. Press Release, March 10, 1942, JA 136.

<sup>5</sup> The military did begin to conduct an individualized "loyalty review" program, providing for the release of individuals of established loyalty, in February 1943. But this program provided only slow, piecemeal release. It was not until *Ex parte Endo*, 323 U.S.

sion on Wartime Relocation and Internment of Civilians (CWRIC),<sup>6</sup> detention continued after military authorities concluded that there was no further military justification for the internment.<sup>7</sup> Motivated by a desire to capture Western votes in the 1944 election, President Roosevelt refused to take any "drastic" action. REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 229 (1982) (PERSONAL JUSTICE DENIED). Finally, on November 10, 1944 the cabinet decided to end the exclusion; the War Department publicly rescinded the exclusion order on December 17, 1944. Administrative delay, however, prolonged detention for many. It was not until March 1946 that the last camp closed.

#### B. Deference and Concealment

In *Hirabayashi v. United States*, 320 U.S. 81 (1943), the Supreme Court considered the constitutionality of the curfew regulations imposed pursuant to Executive Order 9066. In *Korematsu v. United States*, 323 U.S. 214

283 (1944), that the Supreme Court held it unlawful to continue to detain an internee in a Relocation Center after she had received clearance for an indefinite leave under the loyalty review program. Prior to that decision the WRA refused to release even those internees whose loyalty had been duly certified if the internee desired to live in an area that had not been approved by the WRA. *Id.* at 293.

<sup>6</sup> The Commission was established by Pub. L. No. 96-317, 94 Stat. 964, 96th Cong., 2d Sess. (1980). It was charged with issuing a comprehensive report on the internment program. Its report was issued in late 1982. See REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982) (PERSONAL JUSTICE DENIED).

<sup>7</sup> By May 26, 1944 Secretary of War Stimson was proposing an end to the exclusion. The new Commanding General of the Western Command, C. H. Bonsteel, wrote there was no longer a military necessity for exclusion as of July 3, 1944. PERSONAL JUSTICE DENIED at 228-229.



(1944), the Court considered the constitutionality of the decision to exclude Japanese-Americans from the West Coast. In both cases the Court based its decision on the government's allegations of military necessity. In these two cases the Court erected a virtually insurmountable presumption of deference to the judgment of the military authorities. Appellants allege, however, that the application of this deferential standard was marred by the fraudulent concealment of evidence indicating that there was no rational basis for the mass evacuation program.

1. *Hirabayashi: concealment of evidence and deference to the judgment of the "war-making branches."* The Department of Justice's basic argument in *Hirabayashi* rested on two propositions. First, various cultural characteristics suggested that there was a serious potential for disloyalty by some members of the Japanese-American community. *Hirabayashi*, Brief for the United States at 18-31.<sup>8</sup> Second, under the exigencies imposed by the military emergency, it was impossible to segregate the loyal from the disloyal. *Id.* at 61-63. This double-barrelled argument proved decisive. After reviewing the factors suggesting that members of the Japanese-American community might be disloyal, Chief Justice Stone concluded:

Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the

<sup>8</sup> The government noted the prevalence of dual citizenship among Japanese-Americans, their practice of Shintoism (which entails emperor worship), Japanese language schools on the West Coast, the links between West Coast Japanese organizations and Japan, the large number of Japanese aliens within the community, and a significant number (about 10,000) of Japanese-Americans who had been sent to Japan for their education. *Hirabayashi*, Brief for the United States at 11.

war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with \* \* \*.

320 U.S. at 99. The Court, however, did not purport to make an independent assessment of the evidence. As the Chief Justice indicated, the Court's decision rested first and foremost on a pivotal constitutional assumption: that where matters of national security are at issue, the Court must defer to the judgment of the military and of Congress<sup>9</sup> as the "war-making branches."

As the Justice Department prepared its brief, however, Edward Ennis, the Director of the Alien Enemy Control

<sup>9</sup> The Court found congressional ratification of the exclusion program in Pub. L. No. 503, 56 Stat. 172, 77th Cong., 2d Sess. (1942), providing for criminal penalties for violation of orders issued pursuant to Executive Order 9066. See *Hirabayashi v. United States*, 320 U.S. 81, 91 (1943). But it is important to recognize that to the extent that the *Hirabayashi* Court based its opinion on deference to a congressional judgment, see *id.* at 90-91, it was only deferring to a congressional decision to defer to the military on the validity of the exclusion program. Congress did not make an independent factual analysis. Although hearings were held before the Select Committee Investigating National Defense Mitigation (Tolan Committee), none of the witnesses were members of the intelligence community. See H.R. Rep. No. 1911, 77th Cong., 2d Sess. 4 & n.2 (1942). Moreover, the Committee expressly declared that it based its endorsement of the evacuation program on the need to defer to the judgment of the military authorities, not on its own analysis of the facts. See *id.* at 13, 15. See also H.R. Rep. No. 2124, 77th Cong., 2d Sess. 11 (1942) (reiterating that "[w]ith respect to the question of the evacuation of the Japanese population \* \* \*, the decision of the military must be final"); PERSONAL JUSTICE DENIED at 98 (concluding that the Tolan Committee merely "assumed that Secretary [of the Navy] Knox knew what he was talking about and that the President was acting on informed opinion"). Thus to the extent that the Court was misled as to the soundness of the military judgment it was similarly misled as to the soundness of the congressional judgment to defer to the military.

Unit, came into possession of the intelligence work of one Lt. Commander Kenneth D. Ringle, an expert on Japanese intelligence in the Office of Naval Intelligence.<sup>10</sup> Ringle had reached conclusions directly contradicting the two key premises in the government's argument. Ringle argued that the cultural characteristics of the Japanese-Americans had *not* resulted in a high risk of disloyalty by members of that group.<sup>11</sup> Moreover, Ringle expressly concluded that individualized determinations *could* be made expeditiously:

[T]he entire "Japanese Problem" has been magnified out of its true proportion, largely because of the physical characteristics of the [Japanese] people \* \* \*.

<sup>10</sup> Lt. Commander Ringle first compiled his conclusions in K. Ringle, *Report on the Japanese Question* (Jan. 26, 1942) (*Ringle Report*), JA 91-100, which he submitted to the Chief of Naval Intelligence. He subsequently included his conclusions in an article published anonymously in the October 1942 issue of Harpers magazine, under the title *The Japanese in America, the Problem and Solution* (by "An Intelligence Officer"). It appears that although Ennis did not have an actual copy of Ringle's *Report* when he drafted his *Memorandum*, he did have a copy of the Harpers article and knew that Ringle was the author of this article. Ennis also had in his possession a memorandum prepared by Ringle for the WRA on the Japanese-American question. Thus all of Ringle's critical findings, including a verbatim statement of his conclusion that the "Japanese Problem" could be solved on an individual basis, quoted in text *infra* at 9, were included in the materials before Ennis at the time he drafted his memorandum. See E. Ennis, *Memorandum for the Solicitor General* (April 30, 1943) (*Ennis I*) at 1, JA 115.

<sup>11</sup> He also noted that the Americanization of the Nisei (American-born) had proceeded quite rapidly (cultural societies and Shintoism notwithstanding). Thus, as to the automatic dual citizenship imposed by Japanese law, Ringle noted that many of the Nisei had divested themselves of such dual citizenship, even though this entailed loss of property rights in Japan. Finally, he noted that although the Kibei (American-born Japanese predominantly educated in Japan) might present a loyalty risk, their identities could be ascertained from government records and they should be dealt with as a discrete problem. See *Ringle Report* at 2-5, J.A. 102-106.

[I]t should be handled on the basis of the *individual*, regardless of citizenship, and *not* on a racial basis.

K. Ringle, *Report on the Japanese Question* 3 (Jan. 26, 1942) (*Ringle Report*), JA 93 (emphasis in original).<sup>12</sup>

Ennis knew that Ringle's views could not be dismissed as those of a solitary dissident, for Ennis had been informed that Ringle's views were shared by his superiors at Naval Intelligence. E. Ennis, *Memorandum for the Solicitor General* (April 30, 1943) (*Ennis I*) at 2, JA 116. Ennis also knew that the Army and Navy had previously agreed that Naval Intelligence would assume responsibility for the Japanese issue.<sup>13</sup> Nor did Ennis question the reliability of Ringle's report; on the contrary, he found Ringle's report the "most reasonable and objective discussion of the security problem presented by the presence of the Japanese minority" of all of the "great numbers of reports, memoranda, and articles" that he had perused over the previous year. *Id.* at 3, JA 117. And Ennis fully understood that Ringle's conclusions directly undermined the government's case.<sup>14</sup> He therefore concluded:

<sup>12</sup> In support of this conclusion Ringle noted, *inter alia*, that the number of Japanese aliens and citizens who would act as enemy agents was less than 3,500 and that the identity of these individuals was well known to U.S. intelligence (indeed, the most dangerous were already in custody). See *Ringle Report* at 2, JA 102.

<sup>13</sup> Indeed, Ennis went so far as to say that "to a very considerable extent the Army \* \* \* is bound by the opinion of the Naval officers in Japanese matters." *Ennis I* at 3, JA 117.

<sup>14</sup> Ennis was quite explicit on this point in his memorandum to the Solicitor:

[I]n view of the fact that the Department of Justice is now representing the Army in the Supreme Court of the United States and is arguing that a partial, selective evacuation was impracticable, we must consider most carefully what our obligation to the Court is in view of the fact that the responsible Intelligence agency regarded a selective evacuation as not only sufficient but preferable \* \* \*. Thus, in one of the crucial points



I think we should consider very carefully whether we do not have a duty to advise the Court of the existence of the Ringle memorandum and of the fact that this represents the view of the Office of Naval Intelligence. It occurs to me that any other course of conduct might approximate the suppression of evidence.

*Ennis I* at 4, JA 118.

Notwithstanding Ennis' plea, the Justice Department's brief made no mention of Ringle's analysis.<sup>15</sup> Equally important, it is now apparent that there were *no* countervailing professional intelligence analyses justifying the need for a mass evacuation based on race.<sup>16</sup> Thus the CWRIC concluded in 1982 that political pressure, not

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of the case the Government is forced to argue that individual, selective evacuation would have been impractical and insufficient when we have positive knowledge that the only Intelligence agency responsible for advising Gen. DeWitt gave him advice directly to the contrary.

*Ennis I* at 3, JA 117.

<sup>15</sup> The brief did cite to the Harpers article. Although that article was signed "An Intelligence Officer," there was no way that the Court could have verified this fact. Moreover, the Justice Department did not endorse all of the conclusions in that article. It cited the article only for the proposition that Japanese-Americans educated in Japan would probably be loyal to Japan. *Hirabayashi*, Brief for the United States at 29 n.46.

<sup>16</sup> See *PERSONAL JUSTICE DENIED* at 52-60. Of the professional intelligence services, Naval Intelligence and the FBI shared the job of monitoring the Japanese-American situation on the West Coast. Ringle's views reflected the opinion of Naval Intelligence. FBI Director Hoover expressed his view in a memorandum to the Attorney General dated February 2, 1944. *Id.* at 55 & nn. 33, 35. Hoover believed that the Japanese did not rely primarily on Japanese-Americans for their espionage work. Only the San Diego and Seattle FBI field offices supported the concept of a mass evacuation, but as the CWRIC observed, "Hoover's own opinion, and thus the Bureau's, was that the case to justify mass evacuation for security reasons had not been made." *Id.* at 55.

official intelligence analysis, produced the evacuation, that "[i]ntelligence opinions were disregarded or drowned out," *PERSONAL JUSTICE DENIED* at 60, and that "[t]he promulgation of Executive Order 9066 was not justified by military necessity \* \* \*." *Id.* at 18.

Mere disclosure of Ringle's analysis to the Court, without more, would not likely have changed the result in *Hirabayashi*.<sup>17</sup> But disclosure combined with a concession that the government had no data rebutting Ringle's analysis *would* likely have influenced the outcome. And taken together, the suppression of the Ringle report and the absence of countervailing data suggest that the Justice Department misled the Supreme Court when it argued that "military necessity" justified a mass evacuation of Japanese-American citizens.<sup>18</sup>

2. *Korematsu*: the presumption of deference becomes nearly irrebuttable. In preparing its *Korematsu* brief the Justice Department simply followed the path cut by *Hirabayashi*. See *Korematsu*, Brief for the United States at 11-12, 26. Similarly, in upholding the evacuation the *Korematsu* Court simply reiterated the *Hirabayashi* rationale: time was short, the situation grave, and it was

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<sup>17</sup> Even disclosure of the Ennis memoranda would not have altered the result. For Ennis did not assert that there was *no* basis for the government's position; he argued only that one Naval Intelligence report, "binding" on the Army, contradicted the government's position. *Ennis I* at 3, JA 117.

<sup>18</sup> Of course, it is possible that the War Department and Justice Department might not have had access to the full range of intelligence reports that the CWRIC was able to uncover. Assuming, *arguendo*, that the government was simply unaware of its own intelligence reports in 1943, the Justice Department would be open to charges of gross negligence in failing to inquire whether the Ringle report was contradicted by other intelligence data. Thus, if only by a decision to remain ignorant, the government appears to have concealed the fact that there was no military necessity for the mass evacuation when it argued *Hirabayashi* to the Supreme Court.



impossible readily to distinguish the loyal from the disloyal. 323 U.S. at 218-219.<sup>19</sup>

In *Korematsu*, however, unlike *Hirabayashi*, the litigants provided the Court with a wealth of factual material attacking the factual predicates of the government's argument. See, e.g., *Korematsu*, Brief of Japanese-American Citizens League. Yet for the majority the presumption of deference to the "war-making branches," articulated in *Hirabayashi*, settled the matter. 323 U.S. at 218-219.

By 1944 the Court could rest its presumption of deference to the military judgment on seemingly firmer ground than had been available in *Hirabayashi*. In the interim the War Department had issued an official analysis of the exclusion and internment program, General DeWitt's *Final Report, Japanese Evacuation from the West Coast, 1942* (1943) (*Final Report*), supplying "facts" supporting the conclusions of the *Final Recommendation*. Although much of the *Final Report* addressed the issue whether members of the Japanese-American community had actually engaged in espionage or sabotage, the *Report* did purport to provide factual support for the key premises of the *Hirabayashi* decision: there was widespread disloyalty in the Japanese-American community and it was impossible to separate the loyal from the disloyal in an efficient manner. See *Hohri*, 586 F.Supp. at 777.

Recently uncovered documents, however, suggest that the Justice Department was less than fully candid in revealing to the Court the untrustworthy character of the *Final Report*. For example, the *Final Report* alleged that Japanese-Americans had been engaged in shore-to-ship radio and light signaling to Japanese warships, facilitating attacks on American ships or shore installations. *Id.*

<sup>19</sup> Although the Court did refer to the fact that "investigations made subsequent to the exclusion" had "confirmed" that there were "members of the group who retained loyalties to Japan," the Court clearly was referring to statements made by internees in response to loyalty questionnaires and to requests for repatriation. *Korematsu v. United States*, 323 U.S. 214, 218-219 (1944).

at 4. By the spring of 1944, however, the Attorney General had learned that the allegations of shore-to-ship signaling were baseless. See Letter from FCC Chairman Fly to Attorney General Biddle (April 4, 1944), JA 101-104 (noting that the evacuation appeared to have no effect on radio signaling); Burling, *Memorandum for the Attorney General* (April 12, 1944), JA 119 (discussing letter of FBI Director Hoover on shore-to-ship signaling). Once again, Ennis had demanded full disclosure and had drafted a footnote for the government's brief to that effect, reading:

The Final Report of General DeWitt (which is dated June 5, 1943, but which was not made public until January 1944) is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. The recital of circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signalling by persons of Japanese ancestry, in conflict with information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not ask the Court to take judicial notice of the recital of those facts contained in the report.

Quoted in *Hohri*, 586 F.Supp. at 780. After heated negotiations with attorneys for the War Department, see E. Ennis, *Memorandum for Mr. Herbert Wechsler* (Sept. 30, 1944) (*Ennis II*), JA 120, however, Justice merely inserted the following, ambiguous, footnote in its brief:

The Final Report of General DeWitt (which is dated June 5, 1943 but which was not made public until January 1944), hereinafter cited as *Final Report*, is relied on in this brief for statistics and other details concerning the actual evacuation and the

events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely on the *Final Report* only to the extent that it relates to such facts.

*Korematsu*, Brief for the United States at 11 n.2. Thus the final footnote did not adequately alert the Justices to the lack of empirical data supporting the government's claims.<sup>20</sup> For the *Korematsu* majority, DeWitt's statement was the official view of one of the "war-making branches," 323 U.S. at 218, quoting *Hirabayashi*, 320 U.S. at 99. As noted in *Hirabayashi*, in times of military emergency the Court believed that such "war-making branches" need only have a "rational basis" for race-related classifications. 320 U.S. at 102.<sup>21</sup> And the mere fact that the

<sup>20</sup> Indeed, the majority opinion freely cited to the *Final Report* itself, see 323 U.S. at 219 n.2, notwithstanding the footnote in the government's brief.

<sup>21</sup> We are aware that in *Korematsu* the Court changed its verbal formulation and stated that racial classifications are "immediately suspect" and therefore subject to the "most rigid scrutiny." 323 at 216. In its next breath, however, the Court reaffirmed *Hirabayashi*'s "conclusion" that the Court could not second-guess the "finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal" which necessarily resulted in affirming "the validity of the curfew order as applying to the whole group." *Id.* at 219. Thus, although subsequent cases certainly gave substance to the notion of "rigid scrutiny" and "suspect" classifications, in *Korematsu* itself these phrases accompanied a highly deferential standard of review. For example, at no point did the Court suggest that it would evaluate the exclusion decision to determine whether it was narrowly tailored to effectuate the military goals asserted. Nor was this point lost on the Justices at the time. Justice Jackson, in a stinging dissent, forcefully suggested that the "scrutiny" practiced by the *Korematsu* majority was "rigid" in theory but deferential in fact when he said:

How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has

military's conclusions were hotly disputed, see, e.g., *Korematsu*, Brief of Japanese-American Citizens League, did not make them irrational. Finally, the fact that Congress had "repos[ed] its confidence in this time of war in our military leaders—as inevitably it must," *Korematsu*, 323 U.S. at 223, left little room for judicial reevaluation.<sup>22</sup>

Thus in *Korematsu* the Court crystallized the presumption of deference first articulated in *Hirabayashi*. Once again, the application of this presumption was marred by a failure on the part of the Justice Department to disclose the questionable credibility of the War Department pronouncements. The Court effectively announced that given this presumption of deference no mere incremental evidentiary showing could change its view of the case. Indeed, given the constitutional underpinnings of the Court's holding, it would appear that only a statement by one of the political branches, purporting to assess the evidence as a whole, could have altered the result.

been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.

See *id.* at 245 (Jackson, J. dissenting).

That Justice Jackson could find the credibility of DeWitt's report to be a matter of "sharp" controversy indicates his willingness to evaluate evidence provided by parties other than the political branches of the government. That the majority, by contrast, was less impressed with such evidence underscores the importance of the Justice Department's failure to disclose Ringle's analysis.

<sup>22</sup> As in *Hirabayashi*, however, deference to Congress did not signify deference to an independent analysis of the critical issue in the case: the practicality of segregating the loyal from the disloyal. In addition to reiterating its deference to the 1942 Act, see 323 U.S. at 217, the *Korematsu* Court merely cited congressional findings that there were in fact disloyal members of the Japanese-American community. See *id.* at 219 & n.2.



C. *Extension of the Rule in Korematsu to Claims for Compensation*

In 1948 Congress enacted the American-Japanese Evacuation Claims Act, 50 U.S.C. App. § 1981 *et seq.* (1982) (hereinafter the Claims Act). Under the Act the Attorney General was given jurisdiction to determine claims for "damage to or loss of real or personal property" filed by former evacuees that were a "reasonable and natural consequence of the evacuation \* \* \*." 50 U.S.C. App. § 1981. The Act provided for specific limitations on the types of compensable losses for which claims could be filed.<sup>23</sup> All awards were deemed "final and conclusive for all purposes." 50 U.S.C. App. § 1984(d).

The Claims Act, however, was not passed in recognition of a legal wrong inflicted on the evacuees. On the contrary, the history of the Act reveals that Congress believed it was acting out of moral impulse, not legal obligation. Congress thereby signified its belief that although the *Korematsu* holding may only have applied to the validity of a criminal conviction, the *Korematsu* rationale effectively barred all claims for compensation as well.

The basic justification for the Act was provided in a 1947 letter written by the Secretary of the Interior to the Speaker of the House. This letter was incorporated in the House report, H.R. Rep. No. 732, 80th Cong., 1st Sess. (1947). It provided the sole explanation for the House bill, H.R. 3999, and provided the following insight into the contemporaneous view of the prevailing legal rights of the internees:

<sup>23</sup> See, e.g., 50 U.S.C. App. § 1982(b)(5) (denying compensation for loss of anticipated profits). Similar limits were interpolated through subsequent adjudications. See, e.g., *Claim of Mary Sogawa*, 1 Adjudications of the Attorney General 126 (1950) (denying compensation for expenses of the evacuation); *Claim of George M. Kawaguchi*, 1 Adjudications of the Attorney General 14, 19-20 (1950) (limiting compensation to purchase price, implicitly denying any interest increment).

The only clear recourse which the evacuees now have, through the passage of private relief bills, is totally impractical. To provide for adjudication of the claims by the Court of Claims would be an imposition on that court, because of the small individual amounts involved and the potential volume of claims \* \* \*.

H.R. Rep. No. 732, *supra*, at 3.<sup>24</sup>

In suggesting that the only "clear recourse" then available was through the passage of private bills, the House report indicated that the Committee did not believe the evacuees could state an actionable claim. Similarly, by rejecting the suggestion that the Congress vest jurisdiction in the Court of Claims the report suggests that the Court of Claims did not *already* have jurisdiction to hear such claims under the Tucker Act.<sup>25</sup>

This view was reaffirmed in the subsequent history of the Claims Act. In 1951 Congress amended the Act to allow the Attorney General to settle claims up to \$2,500.

<sup>24</sup> The Senate Report merely adopted the House Report's statement of the "facts and circumstances" justifying the Claims Act. See S. Rep. No. 1740, 80th Cong., 2d Sess. 2 (1948). In addition, nearly identical language was included in the predecessor bill to H.R. 399, H.R. 6780. See H.R. Rep. No. 2679, 79th Cong., 2d Sess. 4 (1946).

<sup>25</sup> The floor debate surrounding passage of the Act also suggests that Congress believed that *Korematsu* had absolved the United States of civil liability. Although there was general discussion of the need to do "justice," see, e.g., 93 Cong. Rec. 9872 (1947) (remarks of Rep. Walter), there was no suggestion that the Japanese-Americans had suffered a legally cognizable wrong. On the contrary, at least two Representatives insisted, without rebuttal, that military necessity had absolved the United States of all liability. See 93 Cong. Rec. 9872-9873 (remarks of Representatives Goff and Gwynne, affirming the legality of the evacuation). At no point was it suggested that the evacuees could gain compensation through the courts.



Both the House and Senate reports affirmed that a perception of "military necessity" supported the evacuation. See S. Rep. No. 601, 82d Cong., 1st Sess. 2 (1951); H.R. Rep. No. 496, 82d Cong., 1st Sess. 2 (1951). The House Report once again reprinted the letter of the Secretary of the Interior, restating the view that the evacuees had no cognizable claims absent the Claims Act. See *id.* at 2-3.

In 1956 Congress amended the Claims Act for the last time, allowing the Attorney General to settle claims up to \$100,000 and giving the Court of Claims jurisdiction over contested claims. Here the legislative history did not directly address the question of the civil liability of the United States absent the Claims Act. The only reference to this issue can be found in the House report, which merely referred to the legislative history of the 1948 Act itself. See H.R. Rep. No. 1809, 84th Cong., 2d Sess. 3 (1956). Thus, to the extent that they addressed the issue at all, the 1956 amendments indirectly evince a continuing belief in the legality of the evacuation policy.

Finally, in administering the Act the Attorney General took the position that the Claims Act was not predicated on the view that the evacuees had suffered a legal wrong. Thus in the leading case of *Claim of Mary Sogawa*, 1 Adjudications of the Attorney General 126 (December 20, 1950), the Attorney General explicitly rejected a claim for compensation for the expenses entailed by the claimant in preparing for evacuation and in obtaining return transportation. In reaching this decision the Attorney General expressly considered and rejected the view that the Claims Act was premised on the notion that the evacuees had suffered an actionable wrong. The opinion concluded:

The foregoing discussion of the legislative history of the Evacuation Claims Act makes it clear, we believe, that it was intended to be an act of bounty \* \* \*. [I]t may not be adjudicated as if the claimant's evacuation constituted a legal wrong, in the

teeth of the decision of the Supreme Court in the *Korematsu* case, *supra*, to the contrary.

*Id.* at 134.

Thus the "war-making branches" once again reaffirmed their belief that military necessity had provided a legal justification for the exclusion program. And in no uncertain terms the Attorney General and Congress had concluded that *Korematsu* not only applied to a criminal conviction but that it also effectively barred claims for compensation arising out of the evacuation program.<sup>26</sup>

The foregoing narrative establishes three points relevant to our analysis. First, the government's suppression of critical evidence in the *Hirabayashi* case contributed to the Supreme Court's conclusion that it must defer to the judgment of Congress and the military authorities that the exclusion program was justified by military necessity. Second, *Korematsu* suggests that the mere presentation of facts contradicting the government's claims could not rebut this presumption of deference; only an official statement by one of the political branches, purporting to assess the evidence when viewed as a whole, could carry that burden. Third, congressional action signalled a general assumption that *Korematsu* not only barred challenges to criminal convictions but applied to

<sup>26</sup> The *Sogawa* principle takes on particular importance in light of congressional silence on this matter throughout the amendment process attending the Claims Act. On two separate occasions Congress had the opportunity to reverse the view expressed in *Sogawa*. It did not do so. Ordinarily, mere congressional inaction does not shed light on the intent of Congress. See *Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980). But where the matter has been subject to subsequent congressional attention then congressional acquiescence may be considered among other relevant factors. Cf. *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983). Congressional inaction in this instance may therefore be properly considered as supplementing more direct evidence that the legislature believed that *Korematsu* absolved the United States of civil liability from claims arising from the evacuation.

civil claims as well. It is against this backdrop that we evaluate the legal contentions of the parties to this suit.

## II. APPELLATE JURISDICTION

Before turning to the merits, we are required to consider whether this court can take appellate jurisdiction over this case. 28 U.S.C. § 1295(a)(2) (1982) provides that the United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction

of an appeal from a final decision of a district court of the United States \* \* \* if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, *except* that jurisdiction of an appeal in a case brought in a district court under section 1346 (a)(1), 1346(b), 1346(e), or 1346(f) of this title \* \* \* shall be governed by sections 1291, 1292, and 1294 of this title \* \* \*.

(Emphasis added.)

Thus Section 1295(a) establishes a general rule that where original jurisdiction is based "in whole or in part" on Tucker Act claims (*i.e.*, on Section 1346(a)(2)), the Federal Circuit has exclusive jurisdiction. But Section 1295(a)(2) also provides for an exception to this general rule. Specifically, Section 1295(a)(2) provides that where original jurisdiction is based, *inter alia*, on Federal Tort Claims Act (FTCA) claims (*i.e.*, on 1346(b)) the general rule—that the Federal Circuit has exclusive appellate jurisdiction over all cases where original jurisdiction was based "in whole or in part" on Section 1346—does not apply.

In this case jurisdiction in the District Court was based, in part, on Section 1346(a)(2) Tucker Act Claims. As an initial matter it might therefore seem proper to apply the general rule stated in Section 1295(a) and assume that the Federal Circuit has exclusive appellate jurisdiction. But original jurisdiction in this case was

also based on Section 1346(b) FTCA claims.<sup>27</sup> This case therefore falls squarely within the "except" clause of Section 1295(a)(2), allowing for appellate jurisdiction in the regional Courts of Appeals.<sup>28</sup>

<sup>27</sup> The dissent correctly warns against the danger of forum shopping in those instances where an attorney adds frivolous FTCA claims to Takings Clause claims in order to obtain appellate jurisdiction in the regional Courts of Appeals. If we believed appellants' FTCA claims were in fact frivolous we would certainly agree with the dissent's conclusion that appeal must lie in the Federal Circuit alone. *Cf. Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1101-1102 (D.C. Cir. 1985) (refusing to find that the Federal Circuit had exclusive jurisdiction where the plaintiff's characterization of her claim as falling under § 1346(a)(2) was "frivolous"). But, as discussed *infra*, appellants' tort claims are not defective because they are substantively farfetched. Appellants have alleged serious wrongs traditionally compensable at common law. Appellants' tort claims are defective because they failed to appreciate the unyielding ("jurisdictional") character of the filing requirements imposed by the FTCA and mistakenly assumed that the FTCA merely codified the more flexible exhaustion doctrine. Such codifications, however, are hardly unknown. *See WATCH v. FCC*, 712 F.2d 677, 681-682 (D.C. Cir. 1983) (finding that the filing requirement of § 405 of the Communications Act merely codified the judge-made exhaustion doctrine, thereby incorporating its various equitable exceptions). Appellants' failure to grasp in full the distinction between filing requirements that are nonwaivable and those that are subject to waiver on equitable grounds hardly renders their tort claims frivolous.

Any suggestion that the lawyers here indulged in forum shopping is without warrant. *Cf. dissent at 6-7*. No deliberate shopping occurred in this and other recent cases presenting a question as to the interpretation of the newly adopted § 1295(a)(2)—cases such as those cited by the dissent at 8. Rather, the parties, including the government, rarely even adverted to the section. The cases thus reveal the parties' oversight or confusion regarding § 1295(a)(2), not their deliberate attempt to steer the case to a favored forum.

<sup>28</sup> Nor does recent case law of this circuit or the Federal Circuit contradict our analysis. Although *Atari, Inc. v. JS&A Group*, 747 F.2d 1422, 1437 n.13 (Fed. Cir. 1984), took an expansive view of the exclusive jurisdiction of the Federal Circuit, that case concerned the problem of pendent claims in general. Here we do not



Appellee argues that the "except" clause should be read to provide appellate jurisdiction in the regional Courts of Appeals only in cases where jurisdiction is based *solely* on Section 1346(b). Brief of appellee at 63. Appellee argues that such a reading would render Section 1295(a)(2) "in accord" with Section 1295(a)(1). But as a comparison of subsections (1) and (2) of Section 1295(a) demonstrates, appellee's argument proves too much.

In subsection (1) Congress indicated that the Federal Circuit would have appellate jurisdiction where original jurisdiction in the District Court was based "in whole or in part" on Section 1338(a) (providing jurisdiction for cases involving patent, copyright, trademark). As appellee notes, subsection (1) also includes an exception. This exception concerns those 1338(a) claims relating to copyrights or trademarks. But the "except" clause in subsection (1) does not contain the same words as the "except" clause in subsection (2). In subsection (1) Congress explicitly stated that the regional Courts of Appeals would only have appellate jurisdiction where the claims related to "copyrights or trademarks *and no other claims* under Section 1338(a)" (emphasis added).<sup>29</sup> By contrast,

consider the problem of pendent claims as a generic matter, but only those claims specifically designated by statute as falling within the "except" clause. Nor does *Professional Managers Ass'n v. United States*, 761 F.2d 740 (D.C. Cir. 1985), prevent us from taking appellate jurisdiction in this case. In *Professional Managers* this court rejected the liberal construction of § 1295(a)(2) adopted by the Seventh Circuit in *Squillacote v. United States*, 747 F.2d 432 (7th Cir. 1984) (refusing to transfer a case to the Federal Circuit where that would be inefficient and unfair to the litigants), *cert. denied*, 105 S.Ct. 2021 (1985). Here we do not base our decision on policy concerns for fairness or efficiency. On the contrary, we take jurisdiction on the basis of our reading of the plain meaning of the statutory language.

<sup>29</sup> The "other" § 1338(a) claims to which this clause refers are patent claims. Thus under § 1295(a)(1) the Federal Circuit has exclusive appellate jurisdiction over mixed patent and copyright/trademark claims.

subsection (2) does *not* limit the "except" clause to cases where jurisdiction is based on FTCA claims and "no other claims" under Section 1346. Given the proximity of subsection (1) to subsection (2), the absence of the phrase "and no other claims" is conspicuous indeed.

It seems that where Congress desired to craft a *narrow* exception, preventing the regional Courts of Appeals from hearing cases with mixed jurisdictional bases, it knew how to unambiguously effectuate its will: it included the phrase "and no other claims." On the other hand, where Congress intended to craft a *broad* exception, allowing the regional Courts of Appeals to hear appeals of cases with mixed jurisdictional bases, it also knew what to do: it simply dropped the words "and no other claims" from the terms of the "except" clause.<sup>30</sup> The "except" clause governing our case is of the broader variety. We take appellate jurisdiction accordingly.<sup>31</sup>

<sup>30</sup> The legislative history of the Federal Courts Improvement Act, 28 U.S.C. § 1295 (1982), is not to the contrary. Both the House and Senate reports indicate that § 1295(a)(2) reflects two conflicting policies. On the one hand, Congress sought to centralize the adjudication of claims in which the United States was a defendant. See S. Rep. No. 275, 97th Cong., 1st Sess. 3-4 (1981); H.R. Rep. No. 312, 97th Cong., 1st Sess. 42 (1981). On the other hand, Congress did not want to centralize adjudication of cases involving tort claims, which would often tend to turn on issues of state law. In such cases Congress preferred adjudication by the regional Courts of Appeals. See S. Rep. No. 275 at 20; H.R. Rep. No. 275 at 20; H.R. Rep. No. 312 at 42.

<sup>31</sup> As indicated *infra*, we affirm the District Court's dismissal of appellants' FTCA claims. Consequently, on remand the case will no longer fit within the "except" clause, original jurisdiction being based solely on § 1346(a)(2). Thus all subsequent appeals of this case will have to be brought in the Federal Circuit, pursuant to the general rule expressed in § 1295(a)(2).

Despite the dissent's unsupported suggestion to the contrary, see dissent at 7, our holding on the statute of limitations constitutes the "law of the case." Our decision that we have jurisdiction over this appeal is subject to reversal only by a superior court. Having determined that we do have authority to decide the instant appeal,



### III. STANDARD OF REVIEW

In deciding a motion to dismiss on the pleadings for want of subject matter jurisdiction "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). See also *Walker v. Jones*, 733 F.2d 923, 925-926 (D.C. Cir. 1984). The District Court, however, is not limited to the allegations of the complaint in deciding a Rule 12(b)(1) motion. Here the District Court properly relied on extra-pleading material in deciding the motion. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 at 549-550 & n.77 (1969 & 1985 Supp.) (collecting citations).

The District Court, however, did not purport to make any factual findings on disputed issues. See *Hohri*, 586 F. Supp. at 773. To the degree it relied on extra-pleading material it did so only where such documents supplied undisputed facts. See, e.g., *id.* at 788 (relying on the "undisputed" facts in the Ennis and Burling memoranda to establish fraudulent concealment). In such circumstances we engage in an independent review of the legal sufficiency of the District Court's views and of its application of the law to undisputed facts in the historical record. See *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). In so doing we construe the allegations of the complaint most favorably to the appellants unless such allegations are contradicted by the undisputed historical documents on which the District Court based its judgment.

we are obliged to instruct the District Court on the inquiry it is to pursue on remand. Thus, because we must "actually decide" the statute of limitations issue, our instruction sets the "law of the case." To invalidate this instruction on later review, the Federal Circuit must find both "clear error" and "manifest injustice" in our disposition of the uncommon tolling question that this case presents. *Laffey v. Northwest Airlines*, 740 F.2d 1071, 1082 & n.18 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 939 (1985).

### IV. SOVEREIGN IMMUNITY

It is well settled that the United States is amenable to suit only in those instances where it has specifically waived its immunity. Two such waivers are alleged in this case: the Tucker Act, 28 U.S.C. § 1346(a)(2) (1982),<sup>32</sup> and the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* (1982). Although we find that the Tucker Act does provide a waiver for appellants' claims founded upon the Takings Clause and upon contract, it appears that sovereign immunity bars the residue of appellants' monetary claims.<sup>33</sup>

#### A. Waiver Under the Tucker Act

The Tucker Act waives sovereign immunity only for those claims founded on statutes, regulations, contracts, or provisions of the Constitution that create substantive rights to money damages. *United States v. Mitchell*, 463 U.S. 206, 216-217 (1983).<sup>34</sup> Whether the Tucker Act

<sup>32</sup> Under this provision the District Courts have concurrent jurisdiction with the Court of Claims for actions against the United States not exceeding \$10,000. This provision, often referred to as the "Little Tucker Act" see, e.g., *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1575 n.15 (Fed. Cir. 1984), should be distinguished from 28 U.S.C. § 1491 (1982) which provides for jurisdiction in the Court of Claims for all claims against the United States regardless of the dollar amount.

<sup>33</sup> Appellants also assert claims for declaratory relief and cite 5 U.S.C. § 702 (1982) as a waiver of sovereign immunity for such claims. Because we find no case or controversy adequate to sustain appellants' declaratory claims, see *infra* at 55, we do not consider the effect of sovereign immunity on such claims.

<sup>34</sup> Thus the Tucker Act reads, in pertinent part:

The District Courts shall have original jurisdiction \* \* \* of \* \* \* any civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort[.]

28 U.S.C. § 1346(a)(2) (1982).

waives sovereign immunity therefore turns on whether plaintiff's claims are based on a statute, regulation, contract, or constitutional provision that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. Testan*, 424 U.S. 392, 400 (1976) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). We must therefore review each of appellants' non-tort claims to determine which, if any, are based on statutes, constitutional provisions, contracts, or regulations that demand monetary compensation.

1. *The Takings Clause claims.* As the District Court noted, appellants' Takings Clause claim "is in essence an inverse condemnation proceeding, in which a citizen is deprived of property by the government and then must initiate judicial action to obtain just compensation." 586 F. Supp. at 783. It is well established that "an individual claiming that the United States has taken his property can seek just compensation under the Tucker Act \* \* \*." *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862, 2880 (1984). Given the alleged damage to appellants' real and personal property directly caused by the evacuation program, there is no question that appellants have stated a claim cognizable under the Takings Clause.<sup>35</sup>

Appellee, however, argues that actions taken pursuant to a "perceived need to protect the national security" cannot constitute a taking. Brief of appellee at 57. There is no legal support for this proposition.<sup>36</sup> Only a showing

<sup>35</sup> Nor can it seriously be contended that the failure of the government to take title to appellants' property bars their claims under the Takings Clause. See *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Indeed, the fact that the government forced appellants to give up actual possession and control of their property suggests that it has committed a taking *per se*. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 431 (1982) (dicta, collecting cases).

<sup>36</sup> The cases cited by appellee do not provide the support alleged. Thus *National Board of YMCA's v. United States*, 395 U.S. 85, 89-90

of actual (and not merely imagined) military emergency vitiates a Takings Clause claim. *United States v. Caltex*, 344 U.S. 149 (1952). Here the gravamen of appellants' claim is that there was no such military emergency. The District Court concluded that, given the procedural posture of this case, the allegations of appellants (as plaintiffs below) were dispositive. We agree. See *Scheuer v. Rhodes*, *supra*.<sup>37</sup>

2. *Contract claims.* Appellants allege breach of express contracts, both oral and written, contracts implied in fact and contracts implied in law. Complaint at 67-68 ¶ 133, JA 73-74. These contracts allegedly concerned the nature of detention, the services (including bailment) to be provided them during detention, and specific protections to be accorded the internees. The contracts allegedly arose from promises made by the relevant authorities and from official conduct.

The Tucker Act, however, waives sovereign immunity only for express contracts and contracts implied in fact. There is no waiver for contracts implied in law or contracts based on equitable principles. See *United States v. Mitchell*, *supra*, 463 U.S. at 218. Consequently, only appellants' claims for breach of express contracts and contracts implied-in-fact appear to survive this threshold bar.

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(1969), merely stands for the proposition that there is no taking where the government incidentally harms plaintiff's property while trying to protect that property from rioters. The same is true of *Monarch Ins. Co. of Ohio v. District of Columbia*, 353 F.Supp. 1259, 1255 [sic] (D. D.C. 1973), *aff'd*, 497 F.2d 684 (D.C. Cir.) (order), *cert. denied*, 419 U.S. 1021 (1974).

<sup>37</sup> It would also appear that the historical findings of the CWRIC, see PERSONAL JUSTICE DENIED at 18, support appellants' allegations on this point. Therefore, it would seem that the extra-pleading evidence of which the District Court took notice, see 586 F.Supp. at 772 n.2, supports the District Court's conclusion on this issue.



3. *Fiduciary duty claims.* By contrast, appellants' fiduciary duty claims are barred by sovereign immunity. Appellants allege that the "statutes, regulations and orders" promulgated by the United States "established a system of comprehensive and pervasive federal control, management, and supervision" over the daily lives of the internees. Complaint at 68 ¶ 134, JA 74. Appellants argue that such a fiduciary duty included an obligation to deal truthfully with the evacuees and that appellee breached its duty by failing to disclose the lack of military necessity for the evacuation. See Complaint at 69 ¶ 135, JA 75.

Appellants' argument is reducible to the proposition that whenever the United States imposes such a pervasive regulatory scheme it necessarily enters into a fiduciary relationship with the individuals whose lives it supervises. Brief of appellants at 42-43. Appellants cite *Mitchell* to support this proposition. We do not read *Mitchell* to go so far.

*Mitchell* construed the clause of the Tucker Act that waives sovereign immunity for claims founded on statute or regulation. 463 U.S. at 218. The Court held that this provision operated to waive sovereign immunity for claims of breach of fiduciary duty where specific statutes or regulations gave rise to the fiduciary duty in question. *Mitchell*, however, found that the relevant statutes and regulations, *by their own terms*, explicitly created a fiduciary relationship by requiring the Secretary of the Interior to manage the Quinalt Indians' assets for the "best interests of the Indian owner \* \* \*." *Id.* at 224 (quoting 25 U.S.C. § 406(a) (1982)).<sup>38</sup>

<sup>38</sup> Regulations also required management of Indian assets "so as to obtain the greatest revenue for the Indians \* \* \*." *United States v. Mitchell*, 463 U.S. 206, 224 (1983) (quoting U.S. Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911)).

In our case there are no analogous statutes or regulations. It is true that the government did sometimes speak of acting for the benefit of the evacuees. See, e.g., Plaintiff's Exhibit Q, War Relocation Authority Tentative Policy Statement, JA 141-146. Within this context the government may have undertaken to treat the internees in a responsible manner. But even assuming, without deciding, that the applicable regulations could be construed to create specific duties to the evacuees, such duties must be distinguished from a comprehensive obligation to provide for the "best interests" of the evacuees. We are reluctant to find that such a distinct, overarching duty is implicit in a narrow set of regulatory obligations.<sup>39</sup>

Appellants also rely on *Juda v. United States*, 6 Cl.Ct. 441 (1984). In *Juda* the court found a tacit contractual commitment by the United States to act as fiduciary for

<sup>39</sup> *United States v. Mitchell*, *supra* note 38, did state that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians." 463 U.S. at 225. We do not read this alternative holding, however, as articulating a broad rule in favor of finding fiduciary relationships by implication whenever the government assumes pervasive control over a group's property. Read in context, the Court created only a narrow exception—for Indian tribes—to the requirement that the government must expressly state its intent to manage the would-be beneficiaries' property as a trustee.

We base our narrow reading of *Mitchell* on the Court's reliance on *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980). *Navajo Tribe* also appears to limit its finding of an "implicit" trust to dealings between the United States and Indian tribes. This reading of *Navajo* is supported by that opinion's reliance on *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942), in which the Court noted that Congress and the judiciary had previously made numerous statements *explicitly* assuming fiduciary obligations. Thus *Mitchell* only stands for the narrow principle that statutes and regulations governing the relations between the United States and Indian tribes may be presumed to contain an implicit assumption of fiduciary obligations, given a history of explicit statements to that effect.



Bikini Islanders whom the United States removed from their atoll in 1946 while the government tested nuclear bombs on that site. *Id.* at 452. Our case is plainly distinguishable. Unlike *Juda*, appellants here have not even alleged that the United States contracted, even tacitly, to act as a fiduciary. Their fiduciary duty argument is based solely on regulatory obligations. Complaint at 68-69 ¶ 134, JA 74-75. Moreover, even if, *arguendo*, the United States did enter into a contractual relationship with the evacuees, it was a contract to provide specific services. Just as we are loathe to impute a regulatory commitment to act as a fiduciary on the basis of alleged narrow regulatory obligations, we are also reluctant to infer a broad contractual commitment to act as fiduciary on the basis of an alleged contract to provide specific services.

4. *Other constitutional claims.* Plaintiffs also allege sundry violations of their constitutional rights under the Due Process,<sup>40</sup> Equal Protection, and Privileges and Immunities Clauses of the Fifth Amendment; the Search and Seizure Clause of the Fourth Amendment; the Cruel and Unusual Punishment Clause of the Eighth Amendment; the rights to fair trial and counsel under the Sixth Amendment; the Press, Speech, Religion, Petition, and Assembly Clauses of the First Amendment; the prohibition of Bills of Attainder and Ex Post Facto Laws and the right to the writ of habeas corpus under Art. I, Section 9; and the protection from involuntary servitude under the Thirteenth Amendment. Complaint at 60-66 ¶¶ 112-113, 116-127, JA 66-72. We find that sovereign immunity bars all such claims.

Appellants allege that the Tucker Act's declaration that the United States is amenable to suit in actions "founded upon the Constitution" waives sovereign immunity for all of their constitutional claims. Brief of ap-

<sup>40</sup> Including the right to substantive due process, travel, and privacy. See Complaint at 65 ¶ 124, JA 71.

pellants at 47; reply brief of appellants at 17. The law of this circuit<sup>41</sup> and of other circuits<sup>42</sup> is to the contrary.

Appellants argue, however, that because some of these constitutional provisions have been found to mandate compensation in *Bivens* actions against individual defendants, this court ought to find that they also mandate compensation in an action against the United States. Brief of appellants at 48, 50-51. This circuit has rejected that view. See *Clark v. Library of Congress*, 750 F.2d 89, 103 (D.C. Cir. 1984); *Monarch Ins. Co. of Ohio v. District of Columbia*, 353 F.Supp. 1249, 1254 (D. D.C. 1973), *aff'd*, 497 F.2d 684 (D.C. Cir.), *cert. denied*, 419 U.S. 1021 (1974). See also *Garcia v. United States*, 666 F.2d 960, 966 (5th Cir.), *cert. denied*, 459 U.S. 832 (1982).<sup>43</sup>

<sup>41</sup> See *Clark v. Library of Congress*, 750 F.2d 89, 103 n.31 (D.C. Cir. 1984) (noting that "[t]he courts have uniformly held that jurisdiction under the 'founded upon the constitution' grant of the Tucker Act is limited to claims under the 'takings clause' of the Fifth Amendment"); *Lombard v. United States*, 690 F.2d 215, 227 (D.C. Cir. 1982) (finding sovereign immunity a bar to First, Fifth, Ninth, and Tenth Amendment claims when such claims could be construed to run against the government itself), *cert. denied*, 462 U.S. 1118 (1983); *Jalil v. Campbell*, 590 F.2d 1120, 1122 (D.C. Cir. 1978) (*per curiam*) (no right to compensation under the equal protection clause).

<sup>42</sup> See, e.g., *Radin v. United States*, 699 F.2d 681, 685 n.8 (4th Cir. 1983); *Jaffee v. United States*, 592 F.2d 712 (3d Cir.) (*en banc*), *cert. denied*, 441 U.S. 961 (1979); *Duarte v. United States*, 532 F.2d 850, 852 (2d Cir. 1976).

<sup>43</sup> Appellants' allegations that these constitutional violations provide the predicate for claims based on the Civil Rights Acts, 42 U.S.C. §§ 1981, 1983, 1985-1986 (1982), is similarly without merit. These statutes, by their terms, do not apply to actions against the United States. See *Timmons v. United States*, 672 F.2d 1373, 1380 (11th Cir. 1982) (§ 1981 does not waive sovereign immunity); *Unimex, Inc. v. HUD*, 594 F.2d 1060, 1061 (5th Cir. 1979) (none of the Civil Rights Acts waive sovereign immunity); *Monarch Inc. Co. of Ohio v. District of Columbia*, *supra* note 36, 353 F.Supp. at 1252 (§ 1983 does not waive sovereign immunity).

## B. Waiver Under the Federal Tort Claims Act

Appellants allege a series of common law<sup>44</sup> torts, *see* Complaint at 66-67 ¶¶ 129-131, JA 72-73,<sup>45</sup> for which they claim the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* (1982), waives sovereign immunity. Appellants' failure, however, to comply with the unyielding administrative filing requirements of the FTCA bars their claims.

Under 28 U.S.C. § 2675(a) a plaintiff must file his claim with the appropriate government agency before bringing suit in federal court. This explicit statutory directive applies without exception and therefore has been termed "jurisdictional." *See Odin v. United States*, 656 F.2d 798, 802 (D.C. Cir. 1981). The FTCA's mandatory administrative filing requirement is not to be confused with the prudential, judge-made exhaustion doctrine, or other requirements that indicate a general, but not an inexorable, rule. Unlike the exhaustion requirement, the jurisdictional FTCA filing requirement is not subject to equitable waiver.<sup>46</sup> Moreover, whatever the equities affect-

<sup>44</sup> Appellants also argue that their constitutional torts are cognizable under the Federal Tort Claims Act. Although we doubt the validity of this argument, *see Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1593 (1984), we need not reach that issue here. Appellants' failure to comply with nonwaivable filing requirements bars all claims under the FTCA whatever their substantive legal basis.

<sup>45</sup> Specifically appellants allege assault, battery, false arrest and imprisonment, abuse of process, malicious prosecution, and negligent damage to their persons and property. The FTCA bars all claims for intentional torts that arose before 1974. *See* 28 U.S.C. § 2680(h) (1982). Because appellants, however, have failed to comply with mandatory filing requirements we need not reach the thorny question of when appellants' claims "arose."

<sup>46</sup> Compare *Keene Corp. v. United States*, 700 F.2d 836, 841 (2d Cir. 1983) (refusing to waive the FTCA filing requirement on equitable grounds), *cert. denied*, 104 S.Ct. 195 (1984); *Lunsford v. United States*, 570 F.2d 221, 224 (8th Cir. 1977) (same); *Blain v. United States*, 552 F.2d 289, 291 (9th Cir. 1977) (same); *Best*

ing appellants' claims before 1980, there was no reason why appellants should have failed to file their claims *after* 1980 and the congressional declaration releasing the courts from their presumption of deference to the findings of the political branches in this case.<sup>47</sup> Appellants FTCA claims therefore must be dismissed for failure to meet the statute's stringent "file first with the agency" instruction.<sup>48</sup>

*Bearings Co. v. United States*, 463 F.2d 1177, 1179 (7th Cir. 1972) (same); *Bialowas v. United States*, 443 F.2d 1047, 1049 (3d Cir. 1971) (same), *with Athlone Industries, Inc. v. CPSC*, 707 F.2d 1485, 1488 (D.C. Cir. 1983) (exhaustion doctrine is subject to equitable waiver); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 703 (D.C. Cir. 1975) (statutory notice requirements at issue found subject to equitable waiver).

Nor do cases concerning waiver of the filing requirement in suits initially brought in state court and subsequently removed pursuant to 28 U.S.C. § 2679(d) (1982) aid appellants' cause. Such cases involve suits initially brought in state court on the theory that the government was *not* a party and only subsequently removed once it was determined that the employee was acting in his official capacity. Under such circumstances it would be nonsensical to impose a mandatory filing requirement. Consequently, it is not surprising that at least one circuit has found that § 2675(a) does not apply to such cases. *See Kelly v. United States*, 568 F.2d 259 (2d Cir.), *cert. denied*, 439 U.S. 830 (1978). In our case, however, appellants sued the United States from the outset. At no point did appellants purport to be suing an employee of the United States acting in his individual capacity. Section 2675(a) therefore applies and cannot be waived.

<sup>47</sup> For an analysis of congressional action in the 1970's, *see infra* at 49-50.

<sup>48</sup> Nor can this court "stay" these proceedings and allow appellants to now comply with § 2675(a). Even if this were a proper course of action it would not aid appellants for their attention to § 2675(a) comes too late. Under 28 U.S.C. § 2401(b) (1982) a claimant must file with the appropriate agency within two years of the time a claim "accrues." Even assuming that appellants' claims did not "accrue" until early 1983, the statute has now run. *See Schuler v. United States*, 628 F.2d 199, 201 (D.C. Cir. 1980) (*en banc*) (*per curiam*).



## V. STATUTE OF LIMITATIONS

28 U.S.C. § 2401(a) (1982) is the statute of limitations governing appellants' Taking Clause and contract claims. It provides that a claim must be filed within six years of the time that the "right of action first accrues." Appellee argues that appellants' cause of action first "accrued" when appellants' [sic] were first subjected to the evacuation program. Brief of appellee at 16. For their part appellants argue that because the government fraudulently concealed essential elements of their cause of action the statute of limitations was tolled until they actually discovered the facts that had been concealed. Brief of appellants at 28. The law of this circuit supports neither view. Instead, our cases hold that when a defendant fraudulently conceals the basis of a plaintiff's cause of action, the statute of limitations is tolled until the time that a reasonably diligent plaintiff could have discovered the elements of his claim. Applying this standard to the case at bar, we hold that although appellants' contract claims are barred by the statute of limitations, appellants' Takings Clause claims were timely filed.

### A. The Due Diligence Doctrine

1. *The applicable rule.* In *Fitzgerald v. Seamens*, 553 F.2d 220, 228 (D.C. Cir. 1977), this court stated:

Read into every federal statute of limitations \* \* \* is the equitable doctrine that in the case of defendant's fraud or deliberate concealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit.

The due diligence doctrine was reiterated in *Richards v. Mileski*, 662 F.2d 65, 71 (D.C. Cir. 1981), where Judge Mikva, writing for the court, noted that the fraudulent concealment of a plaintiff's "cause of action" would toll

the statute of limitations until a plaintiff has, or through due diligence should have had, notice of his claim. See also *Smith v. Nixon*, 606 F.2d 1183, 1191 (D.C. Cir. 1979). More recently, in *Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1843 (1985), Judge Edwards refined this standard by stating that fraudulent concealment would toll the statute of limitations until a plaintiff could have discovered "facts giving notice of the particular cause of action at issue, not of just any cause of action."

Appellee argues, however, that the due diligence doctrine is not applicable to this case because fraudulent concealment cannot toll a statute of limitations governing claims against the United States. Brief of appellee at 20. And although *Fitzgerald* declared that the doctrine of tolling for fraudulent concealment must be read into "every" statute of limitations, 553 F.2d at 228, this court has not previously addressed the question of whether "every" statute of limitations necessarily includes statutes of limitations governing claims against the United States.

Appellee largely rests its argument on *Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 287-288 (1983), and *Soriano v. United States*, 352 U.S. 270, 276 (1957). These cases firmly establish the proposition that statutes of limitations governing claims against the United States, as conditions on waivers of sovereign immunity, are to be strictly construed. Fully aware of this principle, we nonetheless believe that fraudulent concealment tolls 28 U.S.C. § 2401(a) (1982), the statute of limitations at issue in this case.

An analysis of the historical background of 28 U.S.C. § 2401(a) supports the view that fraudulent concealment does toll the statute. Long before the predecessor to Section 2401(a) was first enacted in 1863, 12 Stat. 765 (37th Cong., 3d Sess. March 3, 1863), a majority of United States jurisdictions has held that a defendant's subsequent concealment of a fraud would toll the statute of limitations. See *Bailey v. Glover*, 88 U.S. (21 Wall.)



342, 348-349 (1875) (collecting cases).<sup>49</sup> Not surprisingly, the Supreme Court has held that "[t]his equitable doctrine is read into every federal statute of limitation." *Homberg v. Armbrecht*, 327 U.S. 392, 397 (1946). Several federal Courts of Appeals have therefore held that fraudulent concealment by the United States will toll the statute of limitations. See, e.g., *Barrett v. United States*, 689 F.2d 324, 329-330 (2d Cir. 1982), *cert. denied*, 462 U.S. 1131 (1983); *Walker v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985). See also *Japanese War Notes Claimants Ass'n of the Philippines, Inc. v. United States*, 373 F.2d 356, 358-359 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967).<sup>50</sup>

<sup>49</sup> It is the settled law of this circuit that the rule of *Bailey v. Glover* extends to cases where the underlying cause of action was not based on fraud. See *Hobson v. Wilson*, 737 F.2d 1, 33 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1843 (1985). According to *Hobson*, the only operative difference between cases where the underlying cause of action sounds in fraud and a case such as that at bar is that in the former the cause of action itself is self-concealing while in the latter the defendant must perform a subsequent act of concealment before the plaintiff can allege fraudulent concealment. But cf. *McCoy v. Wesley Hospital & Nursing Training School*, 188 Kan. 325, 362 P.2d 841, 847 (1961) (restricting the rule of *Bailey v. Glover* to cases where the underlying cause of action sounds in fraud).

<sup>50</sup> Our research reveals only two District Court opinions and two Court of Appeals opinions suggesting that fraudulent concealment does not toll a statute of limitations governing claims against the United States. None are on point. See *Lien v. Beehner*, 453 F.Supp. 604, 606 (N.D. N.Y. 1978) (finding that the equitable considerations raised by wrongful concealment did not toll the statute of limitations in a Federal Tort Claims Act case but not addressing the question of congressional intent in passing the applicable statute of limitations); *Hammond v. United States*, 388 F.Supp. 928, 934 (E.D. N.Y. 1975) (finding that fraudulent concealment did not toll the statutes of limitations but relying on the fact that at that time the FTCA expressly exempted the United States from liability for the fraudulent torts of its employees). As for the Court of Appeals opinions, see *Richter v. United States*, 551 F.2d 1177 (9th Cir. 1977) (merely citing *Hammond* and providing no further analysis);

The foregoing suggests that it would have been inconceivable to the drafters of the statute to read it as exempting the United States from the doctrine of tolling for fraudulent concealment.<sup>51</sup> This conclusion does not contradict the proposition that Section 2401(a) must be strictly construed.<sup>52</sup> We do not interpolate a provision of tolling for fraudulent concealment on the basis of our notions of equity.<sup>53</sup> Rather, we believe that the 1863 Con-

*KSLA-TV, Inc. v. Radio Corp. of America*, 732 F.2d 441, 443 (5th Cir. 1984) (*per curiam*) (finding that fraudulent concealment did not toll a Louisiana statute of preemption).

<sup>51</sup> There is no indication that Congress considered the question of fraudulent concealment and then failed to address the issue in the legislation itself. See *Congressional Globe*, 37th Cong., 3d Sess. 415-416 (Jan. 21, 1863).

<sup>52</sup> Nor does it contradict *Kendall v. United States*, 107 U.S. (17 Otto) 123, 125 (1883), in which the Court held that the 1863 Act's enumeration [*sic*] of "disabilities" that might toll the statute of limitations were not to be enlarged. Although appellants have alleged that their psychological condition during the post-war period should affect our tolling analysis, see brief of appellants at 31, we have refrained from adopting their suggestion. Our opinion does not turn on any alleged "disability" of the appellants, but rather on the conduct of the appellee.

<sup>53</sup> The doctrine of tolling for fraudulent concealment may originally have been of equitable origin, but according to *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348-349 (1875), it had been assimilated into legal doctrine by the late 19th century and did not merely apply to bills in equity. In this connection it should be noted that we reject appellants' suggestion that the government is equitably estopped from raising the statute of limitations defense. Brief of appellants at 38. The statute of limitations is jurisdictional. See *Soriano v. United States*, 352 U.S. 270 (1957). Thus, even if appellee's actions were so egregious as to constitute one of those rare circumstances where estoppel of the government might be appropriate, see *Heckler v. Community Health Services of Crawford*, 104 S.Ct. 2218, 2224 (1984), this court would still have an obligation to consider the issue on its own motion. See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

gress simply assumed that this doctrine was incorporated in "every" statute of limitations and that it would do violence to the intent of Congress for us to hold to the contrary.

For rather different reasons appellants also argue that the due diligence doctrine is not applicable to this case. Our previous cases applying the due diligence doctrine concerned wrongs that were "self-concealing." See *Hobson v. Wilson*, *supra*, 737 F.2d at 34. Noting that this case concerns a wrong that is usually knowable but which has only been obscured by an alleged subsequent positive act of concealment, appellants argue that we should reject the due diligence rule in favor of a standard providing for tolling of the statute until a plaintiff had "actually discovered" what was concealed. Brief of appellants at 28. There appears to be a split in the circuits on this point. Compare *Tomera v. Galt*, 511 F.2d 504, 510 (7th Cir. 1975) (applying an actual discovery rule), with *Campbell v. Upjohn Co.*, 676 F.2d 1122, 1128 (6th Cir. 1982) (applying the due diligence rule).<sup>54</sup>

Given the particular facts of this case, we cannot accept the "actual discovery" standard suggested by appellants. It is the legal effect of fraudulent concealment that tolls the statute, not its immorality. It is one thing to toll the statute of limitations until a reasonable plaintiff could undo the effects of concealment. It is quite another matter to discharge a plaintiff completely from his usual obligations to conduct reasonable inquiries into the grounds supporting his cause. The former course merely nullifies the effect of concealment. It allows the statute of limitations to operate in the manner that Congress pro-

<sup>54</sup> This split may be more apparent than real. As noted in *Campbell v. Upjohn*, 676 F.2d 1122, 1128 (6th Cir. 1982), the effect of all tolling rules is usually to nullify the effect of fraudulent concealment on the reasonably diligent plaintiff. Thus the "actual discovery" cases appear to have generally concerned situations where concealment had been so effective that there was no reason for a diligent plaintiff to have entered into any inquiries as to a possible cause of action.

vided and under the assumption that Congress did not intend for the United States to abuse such statutes by engaging in conscious frauds. The latter approach, by contrast, serves as a punitive measure and perhaps as a deterrent of future fraud. Although such deterrence might make sound policy, we refuse to imply it in an action against the United States absent a congressional suggestion in that direction.

2. *Interpreting the due diligence rule.* Unfortunately, our cases do not provide operational definitions of the key terms of the governing standard. Thus tolling is triggered by concealment of the "facts giving notice of the particular cause of action at issue." *Hobson v. Wilson*, *supra*, 737 F.2d at 35. What falls within the ambit of that phrase, however, is not self-evident. Similarly, the statute begins to run when a "duly diligent" plaintiff would have discovered that which was concealed; but "due diligence" is hardly self-explanatory. Because the facts of this case are *sui generis*, we will refrain from definitively restating the due diligence doctrine. This is not the occasion to establish a new rule to govern future cases. We seek only to clarify our prevailing formula so that there is no mystery as to the basis of our decision here.

(a) *What tolls the statute: concealment of the "factual basis of a complaint."* Appellee argues that the "facts giving notice of the particular cause of action at issue" include only the fact of injury and the identity of the inflictor. Brief of appellee at 22, 24. We do not agree. As already noted, in assessing the import of fraudulent concealment we are first and foremost concerned with its legal effect.<sup>55</sup> Once defendant has effectively closed the

<sup>55</sup> This is not to suggest that knowledge of injury and injurer is without legal significance. Awareness of these facts plainly puts a plaintiff on notice to conduct further inquiries into the nature of his claim. But to be on notice of an obligation to inquire is not the same thing as to have notice of the factual basis of one's claims. See *Hobson v. Wilson*, *supra* note 49, 737 F.2d at 35.



courthouse door to all plaintiffs it is of little significance that defendant has not also concealed his identity or the fact of injury.<sup>56</sup>

Thus, where a defendant concealed information that prevented plaintiff from alleging a crucial element of his

<sup>56</sup> Our analysis should not be taken to contradict *United States v. Kubrick*, 444 U.S. 111 (1979). *Kubrick* simply did not address the question of when fraudulent concealment will toll the statute of limitations. Rather, *Kubrick* concerned the question of when a cause of action "accrues" in a case where there have been no allegations of fraudulent concealment. Indeed in *Kubrick* the defendant's failure to concede facts pertinent to the question of causation was deemed to be of little importance given that the plaintiff could have discovered the relevant information by asking any competent doctor. *Id.* at 122. Thus the holding in *Kubrick*, that a cause of action "accrues" under 28 U.S.C. § 2401(b) (1982) when a victim of medical malpractice is aware of his injury and not when he he [sic] had reason to know all facts pertinent to his cause of action, *id.* at 125, does not contradict our analysis here. Our research reveals only one Court of Appeals to have suggested, even in dicta, that *Kubrick's* analysis of what a plaintiff must know to start the running of the statute of limitations in the absence of fraudulent concealment might apply to cases that do turn on fraudulent concealment. See *Premium Management, Inc. v. Walker*, 648 F.2d 778 (1st Cir. 1981). We believe logic to be on the side of those Courts of Appeals that have rejected this extension of *Kubrick*. See *Arvayo v. United States*, 766 F.2d 1416, 1422 (10th Cir. 1985) (applying *Kubrick* but stressing that there was no issue on concealment); *Barrett v. United States*, 689 F.2d 324, 328-330 (2d Cir. 1982) (refusing to extend the *Kubrick* rule where the extent of fraudulent concealment was put in issue).

Moreover, not only does our analysis not conflict with the holding of *Kubrick*, but we believe it to be in accord with the underlying rationale governing that case. The *Kubrick* Court based its holding on the view that a victim of medical malpractice has some duty to make further inquiries about his condition once he is aware of his injury. 444 U.S. at 118, 122-123. Thus *Kubrick* need merely have asked some doctor other than the one that had treated him about his condition and he would have quickly obtained all the information he needed to state a claim. See *id.* at 123 n.10. As noted below, we would require appellants, even though the victim of fraudulent concealment, to conduct the sort of inquiries mandated by the *Kubrick* Court.

claim, the statute would be tolled.<sup>57</sup> Nor would it change our analysis if a defendant had achieved the same effect by concealing facts that would prevent a plaintiff from overcoming a seemingly ironclad defense. For, as the District Court suggested, where the result is the same—to prevent a law-abiding plaintiff from filing a complaint—it matters little whether the issue is labeled a "claim" or a "defense." 586 F.Supp. at 787.

(b) *When the statute begins to run.* "Due diligence" also lacks a precise definition. But unlike the concept of the "factual basis of the complaint," the concept of "due diligence" is best left unfocused. As we read our cases, "due diligence" refers to a fact-specific judgment in each case as to what a reasonable plaintiff could be expected to do. See *Richards v. Mileski*, *supra*, 662 F.2d at 71.

Nonetheless, two specific guidelines do emerge from our cases. First, in evaluating the extent of a plaintiff's constructive knowledge a court ought to pay careful attention to whether plaintiff was ever put on notice that further inquiries might be appropriate. See *Hobson v. Wilson*, *supra*, 737 F.2d at 35 n.107. Of course, a court must still make a situation-specific judgment as to when (or if) subsequent inquiries might have produced the "factual basis" of a good faith complaint. But an initial determination on when a plaintiff was put on "inquiry notice" will help to narrow the issue. On the other hand, the fact that a plaintiff is on "inquiry notice" does not, without more, begin the running of the statute. See *id.* at 35. Inquiry notice is merely a necessary, but not a suffi-

<sup>57</sup> Lest our view be misconstrued, we would stress that the statute of limitations is not tolled whenever a defendant has concealed facts material to *any* legal issue of significance in a case. We do not provide for tolling simply because a plaintiff's ability to mount a successful case has been impaired in some degree. Instead, we provide for tolling only when concealment has so impaired the plaintiff's case that he is not able to survive a threshold motion to dismiss for failure to tender a claim that would advance beyond the pleading stage.



cient, condition for the running of the statute. Whether such inquiries would lead a diligent plaintiff to discover that which was concealed will naturally vary with the facts of each case.

### B. *The Doctrine Applied*

The foregoing suggests that not every act of concealment will toll the statute of limitations. Concealment must go to a critical element or defense attending each particular cause of action. *See id.* at 35. We must therefore analyze the disparate effect of appellee's course of conduct on the only two claims that are not barred by sovereign immunity: the Takings Clause and contract claims.

1. *The Takings Clause claims and the military emergency doctrine.* In their complaint appellants alleged that the United States concealed the fact that there was no military necessity justifying the exclusion, evacuation, and internment program. Complaint at 52-53 ¶ 96, JA 58-59. The District Court, however, did not restrict its judgment to the pleadings. As previously noted, the District Court also looked to certain undisputed facts in the historical record.<sup>58</sup> After reviewing this material the District Court concluded that it did appear that the United States had concealed critical evidence during the wartime legal challenges to the exclusion program, 586 F.Supp. at 787-788. The District Court assumed, however, that the government's act of concealment was limited to its alleged suppression of the Hoover, Fly, and Ringle memoranda. *See id.* It noted that these documents were in the public domain as early as 1949. *Id.* at 788.<sup>59</sup> It therefore con-

<sup>58</sup> Specifically, the District Court examined the CWRIC report and certain intelligence and Justice Department documents.

<sup>59</sup> According to the District Court, 586 F.Supp. at 788, the Ringle, Hoover, and Fly memoranda were first cited and discussed in M. GRODZINS, *AMERICANS BETRAYED: POLITICS AND THE JAPANESE*

cluded that although the statute of limitations may have been tolled for a time the statute had run long before appellants filed their claims in 1983.

We do not dispute the District Court's reading of the historical record.<sup>60</sup> But because we believe the District Court's analysis to have rested on a legally defective premise, we reverse this aspect of its judgment.

(a) *What was allegedly concealed.* Paragraph 95 of appellants' complaint, Complaint at 52, JA 58, alleges that the government "excluded from the record of pending court actions \* \* \* evidence contradicting the so-called 'military necessity' for mass imprisonment." The District Court credited this allegation, finding it consistent with the undisputed historical material before it. 586 F.2d [sic] at 787-788. But the District Court never considered the legal relevance of this allegation to the particular cause of action pleaded by appellants in this case.

When the government impinges on property rights in the midst of a military emergency, there is no compensable taking under the Fifth Amendment. *United States v. Caltex, supra*, 344 U.S. at 154-156; *United States v. Pacific Railroad*, 120 U.S. 227, 234 (1887). In *Korematsu* and *Hirabayashi* the Supreme Court addressed the question of military necessity as a justification for the evacuation program, albeit not in the context of a Takings

EVACUATION 188-189, 291 & n. 50 (1949). *See also* 586 F.Supp. at 788 n.26 (collecting other works analyzing the evacuation program).

<sup>60</sup> Appellants dismiss these references as mere "secondary" sources. Reply brief of appellants at 6 n.6. Appellants, however, confuse the rules governing admissible evidence at trial and the rules determining when they were on notice of the factual basis of their claims. At the very least, the Grodzins book should have alerted appellants to the need to conduct further inquiries into the factual basis of their claims. And even assuming that the government had refused to disclose the Ringle, Hoover, and Fly memoranda before 1974, after 1974 and the passage of the Freedom of Information Act appellants would have experienced little difficulty in obtaining these documents.

Clause claim. In those cases the Court determined that it must defer to the military judgment that it was impossible, as a practical matter, to segregate the loyal from the disloyal. It is true that Ringle's analysis contained evidence undermining that conclusion. But the Court did not lack for evidence arguing against the military judgment on this vital point. In *Korematsu* the Japanese-American Citizens League (JACL) had submitted a brief that raised substantial questions about the empirical basis of the claim of military necessity.<sup>61</sup> In the face of such contrary evidence, however, the Court determined that it must defer to the military judgment. *Korematsu*, 323 U.S. at 218-219, 223-224.

For the government to have concealed the factual basis of appellants' claims it would not merely have had to conceal evidence suggesting the absence of a military emergency. In addition, *the concealed evidence would have had to be sufficient to rebut the presumption of deference to the military judgment articulated by the Supreme Court*. Given the constitutional underpinnings of the presumption of deference articulated by the Court, however, nothing less than an authoritative statement by one of the political branches, purporting to review the evidence when taken as a whole, could rebut the presumption articulated in *Korematsu*.<sup>62</sup>

<sup>61</sup> Thus the JACL brief included statements by the Attorney General and the Secretary of War in 1941-42 that there were no appreciable fifth column activities by Japanese-Americans, *see Korematsu*, Brief for JACL at 82; statements by President Roosevelt that there had never been a serious threat of invasion of the West Coast, *id.* at 87; and references to Ringle's then anonymous article (signed "An Intelligence Officer") stating that mass evacuations were not necessary, *id.* at 107-108.

<sup>62</sup> Suppression of Ringle's analysis, without more, would not have tolled the statute. Ringle's report did provide specific facts supporting the practicality of individualized action. *Ringle Report* at 1-3, JA 91-93. But even Ringle's report could not provide anything more than incremental evidence against the government's case. Ringle did not purport to have access to all intelligence data

Thus to have concealed evidence going to the very basis of the evacuee's Takings Clause claim, the government would have had to conceal *both* Ringle's report *and* the fact that there were no intelligence reports contradicting Ringle. Although appellants alleged this further act of concealment in their complaint, *see* Complaint at 52 ¶ 96, JA 58, the District Court did not discuss whether the undisputed historical material on which it based its judgment contradicted this allegation. As noted previously, however, nothing prevents us from looking at those same historical documents to determine whether appellants' allegations retain any credibility.

Our reading of the CWRIC report suggests that appellants' allegation does have support in the historical record.<sup>63</sup> At the very least, the CWRIC report suggests that contemporary official intelligence analysis firmly opposed

on the issue. The Court therefore most probably would have assumed that the military had discounted this report in light of conflicting data received from other sources.

Suppression of the Fly and Hoover memoranda, and of the factual weakness of the *Final Report*, in the *Korematsu* brief would have had an even more attenuated effect on a putative Takings Clause claim. As already noted, the controversy over the *Korematsu* brief primarily focused on evidence tending to confirm *ex post* the initial military judgment, evidence of actual acts of espionage. The *Korematsu* and *Hirabayashi* decisions, however, focused on the reasonableness of the evacuation program when viewed *ex ante*. In both decisions the Court relied on the military judgment that it was impossible to segregate the loyal from the *potentially* disloyal in an efficient manner. Thus, although discrediting some aspect of the *Final Report* might have undercut the presumption of deference to some limited degree, it likely would not have changed the outcome *Korematsu* or of a Takings Clause claim.

<sup>63</sup> We do not suggest that appellants' allegation has been established as a matter of fact. We merely review the grant of a motion on the pleadings as supplemented by historical documents. Should the District Court, on remand, find that the government *did* have countervailing intelligence data, contrary to the finding of the CWRIC report, it would be free to find that the statute of limitations was never tolled in this case.



a mass evacuation. See PERSONAL JUSTICE DENIED at 51-60. Moreover, both the CWRIC Report, *see id.*, and the Burling and Ennis memoranda, *see Ennis I*, JA 115-118; J. Burling, *Memorandum for the Attorney General* (April 12, 1944), JA 119, indicate that this information was available to the War Department and the Justice Department at the time it prepared its *Hirabayashi* and *Korematsu* briefs. Given the procedural posture of this case, we must credit the allegations of appellants' complaint unless they are specifically contradicted by the historical documents before the District Court. We therefore conclude that concealment has been alleged sufficient to toll the statute of limitations.<sup>64</sup>

(b) *When the statute began to run.* The District Court found that the statute began to run when reference to the Ringle, Fly, and Hoover memoranda appeared in several books and articles. But just as we do not believe that the suppression of these materials, by itself, could have tolled the statute, we do not find that their disclosure could have started the running of the statute anew. None of these documents could have reversed the presumption of deference erected by the Supreme Court in *Korematsu*. Any court reviewing such documents would have concluded that it must defer to the judgment of the military authorities who often must be presumed to act on the basis of conflicting reports.

Not only would the *Ringle Report* have been discounted as a *partial* statement of the facts, but it could not pass as an *authoritative* statement of one of the political branches. The *Korematsu* and *Hirabayashi* Court

<sup>64</sup> We need not, and do not, pass on whether the concealment at issue violated any ethical obligation of the Solicitor General to the Court. As noted in *Hobson v. Wilson*, *supra* note 49, 737 F.2d at 42, it is not the law of this circuit that the concealment itself must be "wrongful." Moreover, the *Hobson* court held that even if, *arguendo*, concealment itself must be wrongful, the "wrongfulness" of a concealment can consist of the fact that the underlying government action—in this case a taking without just compensation—was wrongful.

grounded its deference to the "war-making branches'" special role in securing the national defense. *Hirabayashi*, 320 U.S. at 99. Consequently, only a statement by one of the political branches could have rebutted the presumption of deference.

Of course, there can be no question but that the publication of the *Ringle Report* should have put the evacuees on notice of the need to conduct further inquiries into possible claims they might have against the United States.<sup>65</sup> It is wholly possible that further inquiries would have uncovered the Ennis and Burling memoranda.<sup>66</sup> Nonetheless, even these memoranda would not likely have affected appellants' legal rights. To be sure, these memoranda indicate that responsible Justice Department officials, who purported to have a wide view of the evidence, had serious doubts about the military necessity rationale. But that is all they represent. They present one side of a heated debate within the Justice Department, and between Justice and the War Department, on the appropriateness of the evacuation policy. They cannot be understood to be an authoritative statement by one of the political branches that there was reason to doubt the basis of the military necessity rationale.

That statement came only in 1980 when Congress passed the Act creating the Commission on Wartime Relocation and Internment of Civilians (CWRIC). Pub. L. 96-317, 94 Stat. 964 (July 31, 1980), *codified at* 50 U.S.C. App. § 1981 note (1982). Section 2(a) provides a brief statement of Findings and Purpose. It states that the Act was passed because "no sufficient inquiry has been made into [the internment]." Pub. L. 96-317 2(a) (3), 94 Stat. 964. This reference is elucidated by the Act's legislative history. According to the House

<sup>65</sup> Indeed, the injuries suffered during the evacuation were probably sufficient to put appellants on inquiry notice.

<sup>66</sup> *But cf. Richards v. Mileski*, 662 F.2d 65, 71 (D.C. Cir. 1981) (a reasonably diligent plaintiff is not necessarily expected to exercise his rights under the Freedom of Information Act).



report, "[T]he committee found that no significant study has been done by the Government to determine the extent of any civil rights violations \* \* \*." H.R. Rep. No. 1146, 96th Cong., 2d Sess. 5 (1980). The Senate report spoke in stronger terms, finding that the "[i]nternees were deprived of their liberty and property apparently based on their ethnic origins alone." S. Rep. No. 751, 96th Cong., 2d Sess. 2 (1980).

At a minimum, the Act can be understood to be a formal statement that Congress no longer believed that the explanation provided by the military authorities for the internment program was adequate and that the issue should be reopened. Moreover, Congress took this step fully cognizant of previous congressional and Supreme Court approval of the legality of internment program. See H.R. Rep. No. 1146, 96th Cong., 2d Sess. 11 (1980) (reprinting the letter of the Assistant Attorney General detailing previous Supreme Court and congressional review of Executive Order 9066). In so doing Congress finally removed the presumption of deference to the judgment of the political branches.<sup>67</sup> With this step the statute of limitations began to run on appellants' Takings Clause claims.<sup>68</sup>

<sup>67</sup> Appellee argues that an earlier statement by the Executive had the effect of ending the presumption of deference to the decision of the war-making branches. See Presidential Proclamation 4417, 12 Compilation of Presidential Documents 245 (1976). In that Proclamation President Ford finally repealed Executive Order 9066. In so doing he did state that Executive Order 9066 had been a "mistake." *Id.* He did not suggest, however, that it had been a legal error. The Proclamation is therefore fairly read merely to state that although the military had the legal authority to act as it did, the course chosen was morally mistaken. Moreover, although President Ford did affirm the loyalty of the Japanese-Americans, *id.* at 246, he said nothing about the critical issue of whether it would have been practical to segregate the loyal from the disloyal in an efficient manner.

<sup>68</sup> Of course, it is possible to read the Act as merely stating that Congress no longer need be satisfied with the previous explanations

2. *The contract claims.* Although not barred by sovereign immunity, the statute of limitations was never tolled for appellants' contract claims. Unlike the "military emergency" doctrine of *United States v. Caltex, supra*, there is no analogous doctrine governing contract claims that suggests that "military necessity" is a defense to a contract claim.

It is true that when the United States has made promises to perform an "act of sovereign" no contract is formed. See *United States v. Juda, supra*, 6 Ct. Cl. at 454. But the mere fact that the government acts to further the national defense does not bring its conduct within the "act of sovereign" doctrine. See *id.* at 454-455 (finding that the evacuation of the Bikini Islanders from their homes to facilitate atomic tests did not constitute an "act of sovereign"). Indeed, the "act of sovereign" doctrine is only invoked where the government can allege that it never intended to form a contract but only sought to distribute public benefits without binding obligations. See *id.*

Thus there is no reason why appellants could not have brought their contract claims in the 1940's. A judicial determination that the government had acted pursuant to a military emergency would have had no effect on their claims. Nor would it have affected their ability to attack the "act of sovereign" defense. That defense would stand or fall, in 1945 or 1985, on whether the United States intended to undertake binding commitments to specific persons or whether it merely intended to distribute public benefits. The existence *vel non* of a military emergency could have only the most attenuated influence on this issue.

for the internment and that Congress, with its power to create commissions with staffs and subpoena power, would now look into this issue anew. This argument, however, only suggests that Public Law 96-317, standing alone, could not produce a legal victory for any former evacuee who brought a claim. But this court has never suggested that claimants must have all of the evidence brought before them "on a silver platter" before the statute begins to run. Brief of appellee at 37.

The concealment of the lack of military necessity therefore did not have any legal effect on appellants' contract claims. Having failed to assert such claims within the statutory period, they may not do so at this later date.

## VI. THE AMERICAN-JAPANESE EVACUATION CLAIMS ACT

### A. *The Exclusivity of the Act*

Appellee argues that appellants' Takings Clause claims must fail because the American-Japanese Evacuation Claims Act constituted an exclusive remedy for all claims arising out of the evacuation and internment program. Brief of appellee at 43. Under *Brown v. GSA*, 425 U.S. 820 (1976), a statute is deemed to provide an exclusive remedy where three conditions are met: (1) the statute provides a detailed and complete scheme for adjudicating claims arising out of a particular subject matter; (2) Congress, rightly or wrongly, did not believe that the affected individuals had alternative remedies at the time it enacted the statute; and (3) the statute addresses a specific injury or issue while alternative remedies address a broader grievance. The Claims Act is obviously specifically tailored to the conditions of the evacuation program. The Act thereby fulfills the third of the *Brown* conditions. But the Claims Act fails to fulfill the first two of the conditions articulated in *Brown*.

First, the Act fails to provide a complete remedy for the losses sustained. As the District Court found, the Act tended to exclude claims for compensation that would have been compensable under the Takings Clause at the time the Act became law. See 586 F.Supp. at 785-786. For example, claimants were not paid for the interest that accrued between the time of the evacuation and the time their claims were paid. Compare *Claim of George M. Kawaguchi*, 1 Adjudications of the Attorney General 14, 19-20 (1956), with *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 306 (1923).

Second, it is true that at the time the Claims Act was passed Congress did not think that the evacuees had any alternative remedies. See H.R. Rep. No. 732, 80th Cong., 2d Sess. 3 (1948). But this fact does not have the same legal meaning in our case that it had in *Brown*. *Brown* turned on the premise that Congress had assumed that the remedies provided by Section 717 of the Civil Rights Act and the government's waiver of sovereign immunity were coterminous. 425 U.S. at 827-828. Put otherwise, *Brown* presumed that the passage of Section 717 not only created new rights but also affirmed specific limits on the government's waiver of sovereign immunity.

In this case, however, Congress could hardly assume that sovereign immunity barred appellants' Takings Clause claims. The Constitution itself provides for the requisite waiver of sovereign immunity. Indeed, any congressional attempt to quash such claims might itself be unconstitutional. Here congressional statements as to the absence of alternative remedies merely constituted a recognition of the power of the military necessity defense, not a specific limit to a waiver of sovereign immunity.

In sum, where Congress speaks of a lack of alternative remedies in circumstances where it could not constitutionally limit a waiver of sovereign immunity, such congressional observations do not imply that any newly created rights must be exclusive of all other remedies. We therefore do not believe that in passing the Claims Act Congress sought to preclude appellants' Takings Clause claims.

### B. *Finality and Discharge*

Even though the Act did not provide for an exclusive remedy, it did contain a provision suggesting that if an evacuee brought a claim under its provisions he would be barred from bringing subsequent claims concerning the evacuation and internment programs. Thus Section 1984



(d) of the American-Japanese Evacuation Claims Act, 50 U.S.C. App. § 1981 *et seq.* (1982), reads as follows:

[T]he payment of an award shall be final and conclusive for all purposes, notwithstanding any other provision of law to the contrary, and shall be a full discharge of the United States \* \* \* with respect to all claims arising out of the same subject matter.

The plain language of Section 1984(d) bars *all* suits brought under the Takings Clause once an evacuee has received an award under the Act.<sup>69</sup> The Claims Act must therefore be read to force claimants to choose between attempting to receive the "bounty" provided by Congress under the Act or exercising their constitutional rights under the Fifth Amendment.

We are not unmindful of the hard choice to which Congress put the evacuees. By forcing them to choose between a ready administrative remedy and a costly lawsuit, Congress effectively forced the evacuees to settle for half a loaf rather than risk a fight for what the Constitution declares to be theirs by right. In so doing Congress acted on the outer perimeter of its authority. It did not, however, exceed its authority.<sup>70</sup> Nor are we

<sup>69</sup> It is true that Congress believed that the evacuees had no alternative remedies at the time it passed the Claims Act. In enacting § 1984(d), however, Congress was guarding against future contingencies. Our analysis of the legislative history of the Claims Act thus does not undermine our reliance on the language of § 1984(d).

<sup>70</sup> We do not believe that § 1984(d) constituted an unconstitutional condition on the exercise of the evacuees' rights under the statute. Although as a general rule the government may not require individuals to waive constitutional rights as a precondition of receiving a bounty, *see Speiser v. Randall*, 357 U.S. 513, 518 (1958); *Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593 (1926), such conditions can be imposed where the right waived is rationally related to the benefit conferred. *See, e.g., Stephenson v. Binford*, 287 U.S. 251, 275 (1932). We are not prepared to say that the

unaware of the manner in which the Solicitor General's alleged wrongful concealment narrowed the evacuees' legal choices at that time. Nonetheless, it is apparent that the *congressional* offer was made in good faith and that the United States is not estopped from raising Section 1984(d).<sup>71</sup> We therefore reluctantly conclude that petitions for reconsideration of this harsh policy of finality are properly addressed to Congress and not to this court.

## VII. DECLARATORY RELIEF

We reject appellants' independent declaratory claim. Appellants argue that there is the danger they may again be visited by racially motivated illegal government actions. Reply brief of appellants at 21. Even assuming, *arguendo*, that there were a substantial probability of such an unfortunate event, appellants would still not have met their burden under Article III. Our case law holds that the mere fear of future governmental action contingent upon future discretionary decisions by political officials does not provide a live case or controversy. *See Halkin v. Helms*, 690 F.2d 977, 1009 (D.C. Cir. 1982).

waiver of subsequent suits was so unrelated to the provision of an inexpensive and convenient procedure as to render § 1984(d) constitutionally infirm.

<sup>71</sup> Although the Supreme Court has yet to determine whether it is ever possible to estop the United States, the Court has stated that, at a minimum, affirmative misconduct must be alleged and such misconduct must be directly responsible for a detrimental change of position. *See Heckler v. Community Health Services of Crawford County, Inc.*, 104 S.Ct. 2218, 2224 (1984). In our case the government's relevant alleged affirmative misconduct occurred in 1942. Although the Solicitor General's action was plainly a contributing factor to the Supreme Court's decision, it also appears that Congress made an independent good faith decision in 1948 to accept the facts as stated in *Korematsu*. Given this intervening good faith decision by Congress, appellants have failed to allege an unbroken chain of causation between the government's misconduct in 1942 and the terms of the Claims Act in 1948. On these facts, estoppel will not lie against the United States.



Appellants also maintain that a declaratory judgment will remedy "present and ongoing psychic damage." Brief of appellants at 56. Such psychic damage, however, standing alone, does not provide the requisite injury in fact. *Cf. Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (subjective effect on First Amendment rights does not provide requisite case or controversy for declaratory relief).

### VIII. CONCLUSION

The United States cannot be presumed to be amenable to suit. Fortunately, the Founders provided that the right to obtain just compensation for the taking on one's property should remain inviolate. In so doing, they no doubt assumed that the normal statutes of limitations would apply. But they also most certainly assumed that the leaders of this Republic would act truthfully. In the main, history has proven the Founders correct. We have also learned, however, that extraordinary injustice can provoke extraordinary acts of concealment. Where such concealment is alleged it ill behooves the government of a free people to evade an honest accounting. Should such concealment be proven here, those individuals who have not received awards under the Claims Act should be free to press this cause to its conclusion.

*Affirmed in part and reversed  
and remanded in part.*

MARKEY, *Chief Judge*, dissenting.

### INTRODUCTION

Courts are not the sole source of justice in our land. And that is well, considering the human imperfections of we few to whom the judicial robe is loaned. In providing that federal courts shall be of limited jurisdiction, in refusing to empower the courts to resolve every conceivable grievance, and in prohibiting abridgement of the right of the people to petition the "Government" for "redress of grievances," the Framers and Amenders writ well.

That wrongs were done to Americans of Japanese ancestry under Executive Order 9066 is disputed by *no one* involved in this case. The internment of fellow Americans on the basis of race, and out of what now appears to have been an excessive enshrinement of military necessity, sets a scenario for retributive justice. But that is *not* the issue before us.

The basic issues before us are: (1) does this court have jurisdiction to hear this appeal? Assuming that question is answered "yes," (2) did the district court err in dismissing appellants' "taking" and "contract" claims in view of the affirmative defense of statute of limitations?<sup>1</sup>

Within the judicial process, as elsewhere, there is no free lunch. To reach a feel-good result here, a price must be paid. That price takes the form of what is in my view a disregard of the written law of Congress and precedents of this court, to the substantial injury of the

<sup>1</sup> If this court had jurisdiction, I would concur in the majority's affirmance of the district court's dismissal of the tort claims for lack of jurisdiction, and in the majority's affirmance of the district court's denial of the request for declaratory relief. Because the district court did not reach the issue, I would say nothing about the effect of the Japanese-American Evacuation Claims Act, 50 U.S.C. § 1981-87 [*sic*].

jurisprudence surrounding 28 U.S.C. § 1346 (1982 & Supp. II 1984). Though sympathy suggests surrender, and compassion counsels capitulation, that price is for me too high.

Convinced that this court lacks jurisdiction, that the majority's holding frustrates Congress' intent when it enacted the Federal Courts Improvement Act, that the district court correctly applied the statute of limitations, and that a remedy better for our nation's jurisprudence and for appellants is available from the Congress, I respectfully dissent.

### I. JURISDICTION TO HEAR THIS APPEAL

This appeal should be transferred, under 28 U.S.C. § 1631, and should be heard and decided by a panel of the United States Court of Appeals for the Federal Circuit, a panel on which I would not sit.

Transfer is compelled by 28 U.S.C. § 1295(a)(2), by which Congress vested in the Federal Circuit *exclusive* jurisdiction over appeals from district court judgments in cases such as this, where the jurisdiction of the district court was based, in whole or in part, on 28 U.S.C. § 1346(a)(2).

Saying "we take jurisdiction on the basis of our reading of the plain meaning of the statutory language," the majority stands the statute on its head when it holds that this court has appellate jurisdiction because jurisdiction of the district court was based "in part" on 28 U.S.C. § 1346(b) (Federal Tort Claims Act). The majority frustrates the intent of Congress, encourages forum shopping, and directly conflicts with precedent in this court, when it holds that this appeal "falls squarely within the 'except' clause of section 1295(a)(2), allowing for jurisdiction in the regional Circuit Court of Appeals," just because counsel included a tort claim under § 1346(b) with the taking claim under § 1346(a)(2).

### A. *The Plain Meaning of the Statute.*

The statutory phrase "in whole or in part" in 28 U.S.C. § 1295(a)(2) would by itself make the exclusive grant of § 1346 jurisdiction to the Federal Circuit all-inclusive. The statute, however, specifies exceptions where the case was "brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when *the* claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue." (Emphasis added). A literal reading of the statute makes plain that the "except clause" applies only to cases brought *in whole* under one of the excepted subsections of § 1346. The majority improperly reads the "except clause" as though it *also* contained the broad jurisdictional grant of "in whole or in part," a construction clearly contrary to the literal language of the statute and destructive of its intent.

It is simply senseless to say that § 1295 grants exclusive jurisdiction to the Federal Circuit in cases where, as here, district court jurisdiction was based "in part" on § 1346(a)(2) and that § 1295 *also* grants jurisdiction to the regional circuits (making the first grant non-exclusive) where, as here, district court jurisdiction was based "in part" on § 1346(a)(2). It is equally senseless to nullify the words "in part" in § 1295(a)(2) by proceeding as though the statute granted exclusive jurisdiction to the Federal Circuit only when district court jurisdiction was based "in whole," that is solely, on a taking claim under § 1346(a)(2).

The majority's construction of § 1295(a)(2) in light of § 1295(a)(1) is equally invalid. In § 1295(a)(1), Congress excluded from the Federal Circuit's exclusive jurisdiction over cases brought under § 1338 "a case involving a claim arising under any Act of Congress relating to copyrights and trademarks and no other claims under section 1338(a)." The "no other claims" clause



was required because there are three fields of law encompassed by the *single* subsection 28 U.S.C. § 1338(a). The only "other claim" is one under the patent laws. Hence jurisdiction of cases under § 1338(a) which are brought *in whole* under the copyright or trademark laws, and which involve no patent claims, are appealable to the regional circuits. The assignment of jurisdiction in §§ 1295(a)(1) and (2) is thus the same. Use of § 1295(a)(1)'s "no other claims" language in § 1295(a)(2) would simply not fit, because these are specific subsections in § 1346, each dealing with a separate field of law.

Section 1346 deals with district court and Claims Court jurisdiction. The except clause of § 1295(a)(2) deals with tax refunds, § 1346(a)(1), money damages for torts, § 1346(b), a series of causes provided for in certain statutes, § 1346(e), quieting title, § 1346(f) and certain tax suits, § 1346(a)(2). It simply makes no sense to say that the "in part" language of § 1295(a)(2) gave jurisdiction *simultaneously* to the Federal Circuit and regional circuits over appeals from district court judgment whenever the case was brought under § 1346(a)(2) and also under anyone of the sections in the except clause. Nor is it appropriate to read "exclusive" out of § 1295(a)(2).

Further, it is most curious that the majority rests its holding of jurisdiction on the presence of appellants' claim under the Federal Tort Claims Act, § 1346(b). Appellants never filed an administrative claim, *Hohri v. United States*, 586 F. Supp. 769, 793 (D.D.C. 1984), and thus failed to cross the threshold requirement for suing under the Tort Claims Act. 28 U.S.C. § 2675(a). The majority properly affirms the district court's dismissal of those claims under Rule 12(b)(1) for lack of jurisdiction. It is difficult to see how claims over which the district court had no jurisdiction can create jurisdiction in this court. The claims under the Tort Claims Act being entirely illusory, they can provide no satisfactory basis for jurisdiction of either the district court or this court.

## B. Congressional Intent.

### (1) Uniformity

In creating the Federal Circuit, Congress clearly expressed the need to provide "a forum for appeals from throughout the country in areas of the law where Congress determines that there is special need for national uniformity." S. Rep. No. 97-180, 97th Cong., 2d Sess. 4, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3, 14 (Senate Reports). Suits against the government for money damages, like those under § 1346(a)(2) (the "Little Tucker Act") constituted one such area of special and long-recognized need. Indeed, that basic need engendered creation of the Court of Claims in 1855.

Before October 1, 1982, suits against the United States for money damages in excess of \$10,000 had to be filed in the Court of Claims, and suits against the United States for \$10,000 or less could be filed in either the Court of Claims or in a district court. Appeals from judgments of the Court of Claims were by writ of certiorari to the Supreme Court and appeals from judgments of the district courts were to the appropriate regional Circuit Court of Appeals. As stated in the legislative history "an adequate showing has been made for nationwide subject matter jurisdiction in the areas of patent and claims court [sic] appeals." Senate Report at 3, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 13.

After October 1, 1982, suits for more than \$10,000 must be filed in the Claims Court, and suits for \$10,000 or less may still be filed in a district court. In accord with the intent of Congress expressed in the Federal Courts Improvement Act of 1982, P.L. No. 97-164, 96 Stat. 25 (1982), however, *appeals* from judgments in *all* such suits filed after October 1, 1982, are within the *exclusive* jurisdiction of the Federal Circuit "to provide reasonably quick and definitive answers to legal questions of nationwide significance." Senate Report at 3, *reprinted in* 1982 U.S. Cong. & Ad. News at 13. The Federal



Circuit hears all appeals from judgments of the Claims Court. § 1295(a)(3). Congress sought uniformity in the law governing suits under § 1346(a)(2) when it also assigned exclusive jurisdiction to the Federal Circuit over all appeals from all judgments of the district courts in such suits. Thus, the Federal Circuit has been granted exclusive jurisdiction, whether those suits were for more than \$10,000 in the Claims Court or for \$10,000 or less in a district court.

The majority's holding here, because it directs *appeals* on the basis of whether the *ad damnum* is more or less than \$10,000, frustrates Congress' desire for uniformity in answers to legal questions arising under § 1346(a)(2).

### (2) *Forum Shopping*

The legislative history of § 1295 spells out Congress' intent to eliminate forum shopping, as was exhaustively discussed in *Atari, Inc. v. JS&A Group, Inc.*, 747 F.2d at 1434-35. That intent was not limited to patent-related cases, but applied equally to those which, like the present case, are filed under the "Little Tucker Act." *Id.* at 1437 n.13.

The majority's reading of § 1295(a)(2) reinstates the forum shopping evil congress tried to eliminate. Any lawyer worthy of the name is capable, as were the lawyers here, of adding to a "taking" claim under § 1346(a)(2) one or more claims under § 1346(a)(1), 1346(b), 1346(e), 1346(f) or an internal revenue claim under § 1346(a)(2). The majority's reading of § 1295(a)(2) tells the bar it can obtain jurisdiction of the appeal in this court by inserting any one of such additional claims in the complaint, and may thus escape the statute of limitations governing the taking claim under the majority's view of the present or similar facts. It is precisely the creation of potential for different results on similar facts (respecting the limitation of actions under § 1346) by which the majority holding provides both opportunity and incentive for forum shopping.

The evil of forum shopping is the same whether a claim added for that purpose is or is not frivolous. This court, moreover, would have to assert jurisdiction to consider whether a claim was or was not added for that purpose. At that point, the evil purpose has been served. That the majority seizes jurisdiction here on the basis of an illusory claim under the Tort Claims Act only compounds the error that lies in exerting appellate jurisdiction not granted by Congress.

To the extent that policy considerations are appropriate, the majority's creation of a need for multiple appeals in different courts appears unsupportable. Having disposed of appellant's tort and contract claims, the majority says any future appeal in this case will lie in the Federal Circuit. It hardly fits the dignity of this court to render it a mere way station for the gleaning of forum shopping claims from appeals enroute to the Federal Circuit.

Whatever the district court may do on remand, the Federal Circuit cannot, it would seem, be precluded from holding on appeal that the district court lacked jurisdiction because of the statute of limitations. Surely, comity is not served by the majority's attempt to set the law of the case respecting the statute of limitations before releasing its grasp.

### C. *Precedent in this Court*

In *Professional Managers Ass'n v. United States*, 761 F.2d 740 (D.C. Cir. 1985), this court held that "[t]he Federal Courts Improvement Act clearly grants the Federal Circuit exclusive jurisdiction over appeals in cases such as this where the district court's jurisdiction was based in whole or in part on the Tucker Act," *Id.* at 743 (emphasis in original). As a basis for its holding, the court noted that "the legislative history . . . construes the 'in whole or in part' language quite literally." *Id.* at 744. It concluded: "[b]ased on the Senate Report, it would appear that the regional courts of appeals should transfer

cases to the Federal Circuit unless immaterial or frivolous Tucker Act claims have been added to a case for purposes of forum shopping . . ." *Id.* Obviously, transfer is equally if not more required where a frivolous additional claim has been added, for purposes of forum shopping, to a non-frivolous Tucker Act claim.

In *Professional Managers*, the court noted that § 1295 (a) (2) had been a source of confusion in this court, citing Judge McKinnon's dissent in *Doe v. Department of Justice*, 753 F.2d 1092, 1109 (D.C. Cir. 1985), and two cases in which this court ordered transfer: *Wilson v. Turnage*, 755 F.2d 967 (D.C. Cir. 1985); and *Riggsbee v. Bell*, No. 83-2242 (D.C. Cir. Jan. 28, 1985).

Other circuits are in accord with the precedent of this court. See *Hahn v. United States*, 757 F.2d 581, 587 n.3 (3d Cir. 1985); *Oliviera v. United States*, 734 F.2d 760 (11th Cir. 1984); cf. *Maier v. Orr*, 754 F.2d 973, 982 (Fed. Cir. 1985) ("[i]n creating this court, Congress assigned it exclusive appellate jurisdiction of district court decisions involving claims for money from the government under § 1346(a) (2)").

I cannot find in the majority opinion an adequate effort to justify its departure from this court's precedent.

## II. STATUTE OF LIMITATIONS

If jurisdiction to hear the appeal were present in this court, I would affirm the district court's judgment in its entirety.

I agree with the majority that the applicable rule in this court was stated in *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1978):

Read into every federal statute of limitations . . . is the equitable doctrine that in the case of defendant's fraud or deliberate concealment of material facts relating to his wrongdoing, time does not begin until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit.

"The basis of the lawsuit," has been variously characterized as "notice of [the] claim," *Richards v. Mileski*, 662 F.2d 65, 71 (D.C. Cir. 1981), and as "facts giving notice of the particular cause of action at issue, not of just any cause of action," *Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1843 (1985). The thought underlying that standard, however articulated, is plain: courts will not permit a defendant to use the statute of limitations as a shield where he has fraudulently obstructed plaintiff from knowing facts on which suit could be brought.

Whatever role equitable tolling considerations may play in suits between individuals, in suits against the United States courts must recognize the condition attached to the United States' waiver of its sovereign immunity. Statutes of limitations such as that applicable here, 28 U.S.C. § 2401(a), "must be strictly observed, and exceptions thereto are not to be lightly implied." *Block v. North Dakota ex rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 287-88 (1983), and cases cited therein.

It is important to note just what was allegedly "concealed" here. Appellants say it is a memorandum from Edward Ennis, Director of the Alien Enemy Control Unit, to the Solicitor General in relation to preparation of the government's brief in *Hirabayashi v. United States*, 320 U.S. 81 (1943)). In that memorandum, Ennis said "we should consider very carefully whether we do not have a duty to advise the Court" of materials drafted by Naval Intelligence Analyst Ringle, in which Ringle gave his opinion that individual loyalty assessments could be expeditiously made. The government did not advise the Court of the existence of Ringle's views in *Hirabayashi*, and ambiguously referred to the unreliable nature of General DeWitt's Final Report in a footnote to its brief in *Korematsu v. United States*, 323 U.S. 214 (1944). Though the Court was fully informed by the amicus brief of the Japanese American Citizens League of unchallenged facts indicating that individual loyalty assess-



ments were eminently [*sic*] feasible, appellants leap to the conjectural conclusion that a clear reference to Ringle's views would have caused the Court to forego the deference to military-necessity-in-wartime on which it affirmed in *Hirabayashi*. So long as the Supreme Court's decisions in *Hirabayashi* and *Korematsu* stood, say appellants, other courts followed them and any suit appellants might have brought would have been foredoomed.

The majority says that "in assessing the import of fraudulent concealment we are first and foremost concerned with its *legal effect*," (emphasis in original), that "it is of little significance that defendant has not also concealed his identity or the facts of the injury," and that tolling is required "if a defendant had achieved the same effect by concealing facts that would prevent a plaintiff from overcoming a seemingly iron-clad defense." (The majority must mean facts that would *enable* a plaintiff to overcome a defense.) For the first time, it is held that the statute must be tolled for whatever length of time (here some thirty-five years) it may take for a plaintiff, who knows all about the injury and defendant's identity, to learn something that might enable him to win.

I respectfully disagree with the majority's expansion of the doctrine of "equitable tolling" to the point at which it swallows the law of sovereign immunity. As properly applied by the district court, following the guidance earlier supplied by this court, the test for equitable tolling is whether the United States intentionally concealed facts in the course of committing a wrong that prevented appellants from knowing the "basis of the lawsuit." *Fitzgerald v. Seamans*, 553 F.2d at 228. The failure of the Solicitor General to discuss in his *Hirabayashi* and *Korematsu* briefs a memorandum opinion on individual loyalty assessment clearly did not conceal the basis of a lawsuit for the injustices done appellants.

In *Hobson v. Wilson*, *supra*, this court, quoting the Supreme Court's statement in *Woods v. Carpenter*, 101

U.S. 135, 143 (1879) that "[c]oncealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry," 737 F.2d at 33, held tolling appropriate because Wilson engaged in "some misleading, deceptive or otherwise contrived action or scheme, *in the course of committing the wrong*, that is designed to mask the existence of the cause of action." *Id.* at 34 (emphasis in original).

*Hobson* was a suit against government employees under the civil rights statutes, not one against the United States under 28 U.S.C. § 1346(a)(2). Considerations of whether concealment occurred during commission of the wrong, and whether it was designed to mask existence of the cause of action, are, however, no less important when the requested tolling would effectuate a judicial waiver of sovereign immunity. When the latter is the case, "[a]s a judicial interpretation of a legislative enactment [statute of limitations], the rule is strictly and narrowly applied." *Weckler v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985).

Whatever may be made of the argument that suit would be fruitless in view of *Hirabayashi* and *Korematsu*, that argument collapsed entirely about 1950. The district court's finding that appellants possessed sufficient facts to file a complaint under the Constitution by at least about 35 years ago, 586 F.Supp. at 788, has not been found clearly erroneous—indeed, it has not truly been contested—in the majority opinion. The attempt to circumvent that finding (as based on a "legally defective premise") is at best utterly unpersuasive. Judge Oberdorfer supported the judgment by finding, correctly I believe, that "[t]he publication in the late 1940's of the previously concealed Ringle, Fly, and Hoover documents, not the publication in the 1980's of the Ennis and Burling memoranda, provided the basis on which plaintiffs could have filed a complaint challenging the military necessity finding and marked the beginning of the statute



of limitations." 586 F. Supp. at 790. In my view, that *uncontroverted* finding, requires affirmance.

If it were relevant, the majority's conjecture that the United States' defense to a suit by appellants in the late 1940's or early 1950's would have been "iron-clad" must be seen as having been adequately treated by the district court. Though noting that the Court's decisions in *Hirabayashi* and *Korematsu* would have constituted a "formidable obstacle," the district court observed that "diligent advocates" have successfully challenged such decisions in the past, and that such a suit could have been filed long ago. 586 F. Supp. at 788. There is no plausible support in the record for the majority's bald assertion that "only a statement by one of the political branches could have rebutted the presumption of deference" due the military authorities. Nor does justification appear for the majority's election to simply ignore the numerous citations by the district court of instances in which Supreme Court statements were reexamined in subsequent cases.

Moreover, if appellants had sued and lost, they might now have petitioned to reopen the judgment based on "newly discovered evidence." It is true that courts are reluctant to reopen a long closed judgment absent some overriding consideration. *Klapprott v. United States*, 335 U.S. 601, 613-15 (1949). Under the majority's *ratio decidendi*, however, appellants are litigiously better off for having sat on their rights than they would have been if they had diligently asserted those rights—a result surely not intended by the Congress when it enacted the statute of limitations governing suits against the government.

### III. APPELLANTS ARE NOT WITHOUT REMEDY

Not to put too fine a point on it, the majority's dramatic characterization of the government's brief as saying "the time for justice has passed" is simply unfair. First, *every* enforcement of the statute of limitations

means the time for justice *dispensed by judges* has passed. Second, the implication of hard-heartedness is unfounded. The government has not, in its brief or anywhere else in this lawsuit, denied that injustices were suffered by Japanese Americans. On the contrary, the government has provided the court with a forthright summary of published scholarly works detailing those injustices. See P. Irons, *Justice at War: The Story of the Japanese-American Internment Cases* (1983); M. Grodzins, *Americans Betrayed: Politics and Japanese Evacuation* (1974); Rostow, *The Japanese-American Cases—A Disaster*, 54 Yale L. J. 489 (1945). All the government briefs can be fairly characterized as saying is that Congress has not waived sovereign immunity from *lawsuits* not timely filed. Government counsel, wherever may lie their sympathies, have no authority to waive sovereign immunity.

Moreover, the majority's characterization misperceives the real thrust of the statute: that "justice," however defined, no longer lies within the province of *courts* to provide. The proper forum for appellants' claims is the Congress.

At oral argument, counsel for both sides acknowledged the pendency in Congress of bills designed to compensate appellants. Those bills would carry out the recommendations of the 1982 *Report of the Commission on Wartime Relocation and Internment of Civilians: Personal Justice Denied*, the Commission having been established by Congress in Pub. L. 96-317, 94 Stat. 964 (July 31, 1980), codified at 50 U.S.C. § 1981 App. note. When Congress has begun a process of providing justice it has made unavailable through the courts, no warrant appears for a heavy handed intervention of lawyers, lawsuits, and judges to frustrate that process.

The investigative powers of the Congress are superior to those of a court, and, though its processes often seem slow, Congress may give "justice" superior to that available to appellants in this lawsuit in which recovery is

now limited to \$10,000 or less. One such bill, S. 1053, 99th Cong., 1st Sess., 131 Cong. Rec. S5222-5235 (daily ed. May 2, 1985) (noted here as a public record), provides for individual payments of \$20,000 and for making such payments *directly* to individuals, without subtraction of all the litigation costs faced by appellants in this case. *See also* H.R. 442, 99th Cong., 1st Sess., 131 Cong. Rec. E61-62 (daily ed. Jan. 3, 1985).

Alternatively, Congress may elect to waive immunity. The "Congressional Reference Cases" provide a voluminous history of instances in which Congress has waived immunity of the United States pursuant to 28 U.S.C. §§ 1492 and 2059. *See Bennett, Private Claims Acts and Congressional References*, Committee on the Judiciary, 90th Cong., 2d Sess. (Comm. Print 1968), *reprinted from* 9 U.S.A.F. JAG L. Rev. 9 (1967). Following enactment of a bill, the proper forum for such cases is the Claims Court. As Judge Bennett (now of the Federal Circuit) has written:

Fairly definite and reliable doctrines have developed in the congressional reference field. The Court of Claims has handled over 100 such cases since World War II. While numerically these cases thus represent only a small part of its total caseload, the complexity, importance and amount of money involved in such cases are often significant. Such cases have represented a complete cross section of the types of cases the court handles when they fall within its general jurisdiction.

Comm. Print at 7.

#### CONCLUSION

As Congress has recently and again reminded the judiciary, "the federal courts are courts of limited jurisdiction." Senate Report at 18, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 28. When courts act beyond their jurisdiction, damage done the law is an ongoing

injury to our entire society. It is of "import most grave" and chips away at a "foundation in our constitutional scheme described as the separation of powers." *United States v. Boe*, 543 F.2d 151, 158 (CCPA 1976). The majority's decision, in my view, rests not on the jurisdiction and precedent of this court, but on a proper sense of outrage and a laudable desire to do "justice." I share those sentiments, but opt for equal justice under law.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
SEPTEMBER TERM, 1985

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No. 84-5460

WILLIAM HOHRI, ET AL.

*v.*

UNITED STATES OF AMERICA

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[Filed May 30, 1986]

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Before: Wright and Ginsburg, Circuit Judges; Markey\*,  
Chief Judge, U.S. Court of Appeals for the  
Federal Circuit

**ORDER**

Upon consideration of appellee's petition for rehearing,  
it is

ORDERED, by the Court, that the petition is denied.

*Per Curiam*

FOR THE COURT

GEORGE A. FISHER  
Clerk

By: /s/ Robert A. Bonner  
ROBERT A. BONNER  
Chief Deputy Clerk

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\* Sitting by designation pursuant to 28 U.S.C. 291(a). Chief  
Judge Markey would grant the petition for rehearing.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 84-5460

WILLIAM HOHRI, et al., APPELLANTS

*v.*

UNITED STATES OF AMERICA

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Appeal from the United States District Court  
for the District of Columbia  
(Civil Action No. 83-750)

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On Appellee's Suggestion for Rehearing En Banc

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Order Filed May 30, 1986

Printed June 13, 1986

*Richard K. Willard*, Assistant Attorney General, De-  
partment of Justice, *Joseph E. diGenova*, United States  
Attorney, *Jeffrey Axelrad*, *Barbara L. Herwig* and *Marc*  
*Johnston*, Attorneys, Department of Justice were on the  
suggestion for rehearing *en banc*.

Before: ROBINSON, *Chief Judge*; WRIGHT, WALD,  
MIKVA, EDWARDS, GINSBURG, BORK, SCALIA,  
STARR, SILBERMAN and BUCKLEY, *Circuit*  
*Judges*.



## ORDER

Appellee's suggestion for rehearing *en banc* has been transmitted to the full court. A vote was requested. A majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellee's suggestion is denied.

*Per Curiam*

Circuit Judges Bork, Scalia, Starr, Silberman and Buckley would grant the suggestion for rehearing *en banc*. A statement is attached.

A statement of Circuit Judges Wright and Ginsburg is also attached.

BORK, *Circuit Judge*, with whom *Circuit Judges* SCALIA, STARR, SILBERMAN and BUCKLEY join, *dissenting from denial of rehearing en banc*: This case should be reheard *en banc*. The panel majority has created an unprecedented rule of absolute deference to the political branches whenever "military necessity" is claimed, even where the claim is irrelevant and however spurious the claim is shown to be. The court did this, moreover, in a case in which it clearly had no jurisdiction. Both errors warrant reconsideration by the full court. I am in complete agreement with the criticisms of the majority opinion expressed in Chief Judge Markey's excellent dissent; I write separately to advance some additional grounds why the majority decision should not be allowed to stand.

Plaintiffs in this case are nineteen individuals, all of whom were either Japanese-Americans subjected to internment during World War II or the representatives of such internees. They sought money damages and a declaratory judgment on twenty-two claims, based upon a variety of alleged constitutional violations, torts, and breaches of contract and fiduciary duties. The district court dismissed each of these claims. The court of appeals affirmed, except as to one claim founded on the fifth amendment to the Constitution. With respect to that claim, virtually every step of the panel majority's reasoning either adopts broad and troublesome propositions or is plainly wrong.

## I.

Plaintiffs alleged that the government internment program effected an uncompensated taking of their property. The statute of limitations requires that such claims be brought no later than six years after the right of action accrues. 28 U.S.C. § 2401(a) (1982). The alleged taking occurred approximately forty years before this lawsuit was filed. The district court properly held that the statute of limitations barred the claims. That conclusion would seem inescapable, but this court reversed and remanded.

## A.

In an effort to escape the statute of limitations that plainly bars this action, the panel majority engaged in contrived reasoning that creates a rule of *absolute* and *permanent* judicial deference to any claim of "military necessity." Judges owe deference to such claims, of course, particularly in wartime, but never before has a court enunciated a deference so great that it requires utter capitulation. So sweeping is the panel majority's new rule, the executive branch may remove American citizens from their homes and impound them in camps, solely on the grounds of race, and courts will not interfere, no matter what facts are shown. So powerful is this rule that courts will not reexamine what was done even when facts establishing the absence of military necessity, or of any plausible belief in its existence, become public and the period of military emergency is long past. So potent is the rule that it applies to associated actions or neglects as to which no claim of military necessity was made or could be made.

I am certain that the majority intended none of this but that is what their argument inevitably leads to. It is easily demonstrated that I do not overstate the rule the panel majority has inadvertently created.

To summarize the majority's reasoning: In *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court upheld the racially-based curfew and the internment regulations. The Court did so because it deferred completely to the judgment of the military authorities that the programs were justified by military necessity. The Court's acceptance of the claim of military necessity for these purposes also had the effect of vitiating any future claims for compensation that might arise under the fifth amendment, since "[w]hen the government impinges on property rights in the midst of a military emergency, there is no compensable taking." *Hohri v. United States*, 782

F.2d 227, 251 (D.C. Cir. 1986). However, according to plaintiffs' allegations, the government had concealed from the Supreme Court both internal memoranda disputing the necessity for the program and "the fact that there were no intelligence reports contradicting" those memoranda. *Id.* at 252. Had both the memoranda and the fact been disclosed, the outcomes in *Hirabayashi* and *Korematsu* would have been different and the finding of military necessity would not have been made. Therefore, the fraudulent concealment of the memoranda and the fact tolled the statute of limitations on the takings claim. Finally, since the Supreme Court had based its reasoning on an irrebuttable presumption of deference to the political branches and the military, "nothing less than an authoritative statement by one of the political branches, purporting to review the evidence when taken as a whole, could rebut" this presumption. *Id.* at 251. The required statement was made in 1980 when Congress created a Commission to investigate the internment. Thus, it was not until 1980 that the basis for this takings claim existed, and, consequently, not until 1980 that the statute of limitations began to run.

In the course of this reasoning, the panel majority remade important law in more than one way. *Hirabayashi* and *Korematsu* are read to reflect an absolute deference to military judgment, though the Supreme Court did not express any such extreme position. Moreover, military necessity is said to justify uncompensated takings of private property even in the United States and well outside the battle zone, regardless of the fact that no one ever claimed that the *takings*, as opposed to the internment, were necessary. Third, the fact that *Hirabayashi* and *Korematsu* were decided during the height of World War II, a circumstance that must certainly figure in calculating their weight as precedent during peacetime, is overlooked in order that their supposed rationale of absolute deference may be made permanent, unless and until one of the political branches admits the absence of military



necessity. Surely we must recognize that courts are likely to accord a claim of military necessity greater deference during a major war than would be proper years later when the emergency is long past and a conventional takings claim is advanced. Finally, courts may not reconsider prior holdings in light of new evidence until "released . . . from the grasp" of those holdings by Congress. Statement by Circuit Judges Wright and Ginsburg at 1. This means that in this context, at least, Congress may dictate the results of lawsuits to the courts.

The truth is that, had plaintiffs filed their claim earlier, they would have been able to use the relevant documents, most of which were already in the public domain, in building their case, as well as anything else accessible through discovery. As Chief Judge Markey pointed out, the essential facts for a legal challenge were well known by 1950. *Hohri*, 782 F.2d at 261-62 (Markey, C.J., dissenting). The government would have borne the burden of persuasion in establishing its affirmative defense and it would not have been able to meet that burden simply by citing *Hirabayashi* and *Korematsu*. See *infra* p. 8. It is only by announcing that *no claim existed* until Congress opened a new inquiry that the majority is able to justify tolling the statute of limitations until 1980.

In so doing, the panel has conducted something more than a mere historical analysis of the reasoning embodied in a pair of Court decisions from the 1940's. It has indicated that the doctrine of absolute deference applies today as well. As recently as 1979, we are told, plaintiffs had no case to bring, because the law laid down in *Korematsu* would have required automatic acquiescence to the expressed judgment of the political branches regardless of whatever factual evidence plaintiffs might have brought forth. Indeed, *no* set of facts in the public domain could possibly be sufficient to form the basis of a lawsuit in the absence of some sort of political retrac-

tion.<sup>1</sup> The statement of Congress has therefore become a "crucial element" of the claim; without it, plaintiffs would have been unable to "survive a threshold motion to dismiss for failure to tender a claim that would advance beyond the pleading stage." *Hohri*, 782 F.2d at 249-50 & n.57.

This means that a claim of military necessity, once made and upheld, may never be challenged in court, no matter what the facts are proved to be, until a political branch states that the claim was known to be baseless when made.<sup>2</sup> To make matters worse, the majority describes its rule of absolute and permanent judicial def-

<sup>1</sup> And, if a statement by a political branch were required, as it clearly should not be, President Ford provided that in a Presidential Proclamation. See Proclamation No. 4417, 3 C.F.R. 8 (1977). The only difficulty is that the statement is inconveniently early, for the panel majority's purposes, since it was made more than six years before this suit was filed. Although the Presidential Proclamation describes the evacuation as "wrong" and a "national mistake[.]" the panel majority found it insufficient to cure the concealment on the ground that it did not expressly declare that a *legal* wrong had been committed. This is the worst sort of hairsplitting. It is difficult to see how a declaration that the evacuation was "wrong" could fail to undercut the finding that it was "necessary." Moreover, if an "authoritative statement" is required, the clear language of this Proclamation fills the need far more naturally than the Act of Congress on which the panel majority relied.

<sup>2</sup> This is one reason the majority's theory of fraudulent concealment seems so contrived. This doctrine, as the majority explains, concerns the concealment of "material facts," *Hohri*, 782 F.2d at 246 (quoting *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977)), and permits the statute to be tolled only until "a 'duly diligent' plaintiff would have discovered that which was concealed." 782 F.2d at 249. That doctrine was warped badly out of shape here, for what was "concealed," apparently, was an *opinion* by Congress, rather than any material facts or information. It is the *source* of the disclosure (Congress), and not the facts themselves, on which the majority's theory rests. Congress' failure to express earlier a formal judgment questioning the justification for the internment was not concealment, and its decision to express its doubts in 1980 had no effect on the statute of limitations.



erence to claims of military necessity as resting on "constitutional underpinnings." *Id.* at 251.

This new doctrine confuses governmental decisions which warrant a degree of deference with those that are unreviewable. Until now, doctrines of deference to the Executive or Congress had never required the unthinking acceptance of unsupported assertions suggested by the majority opinion. Having now held that a statement by one of the political branches is a necessary element to any legal challenge to an assertion of military need, the majority has established a doctrine far more threatening to legitimate civil liberties and to judicial review of government action than any that would have been accomplished through an affirmance of the district court's decision.

#### B.

A word must be said about the panel majority's Statement in response to this dissent. The Statement's attempt to resuscitate the panel majority's original decision only makes that decision's error clearer. The heart of the panel majority's Statement is that the original opinion

most assuredly "creates [no] rule of absolute and permanent judicial deference to any claim of 'military necessity.'" . . . Rather, the opinion simply describes and turns on what we find to be the situation-specific holding of *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944): courts must defer to the judgment of Congress and the Executive that sufficient military necessity existed to justify the *World War II internment policy*. That Supreme Court holding seems to us clear, pin-pointed, and definite. We therefore concluded that the former internees faced an insuperable obstacle to the present suit until the "war-making branches," . . . released the federal courts from the grasp of *Korematsu* and *Hirabayashi*

by indicating that deference was no longer due to the wartime judgment of military necessity for the mass evacuation.

Statement at 1.

This explanation of the original opinion will not do. If the majority's holding really turned on a "situation-specific holding" of *Hirabayashi* and *Korematsu*, which is "clear, pin-pointed, and definite," then those decisions would have posed no obstacle whatever to the bringing of this action ten, twenty, thirty, or even forty years ago. *Hirabayashi* upheld a curfew imposed upon persons of Japanese descent and *Korematsu* upheld their relocation and internment. Neither case holds, or even remotely suggests, that military necessity also required that the internees' property be taken. It is, in fact, perfectly apparent that the taking of property was not the object of, nor was it in any way necessary to, the relocation program. Therefore, on the rationale of the panel majority's Statement, these plaintiffs could have made a takings claim at any time without being in the least hampered, much less absolutely barred, by the holding of *Hirabayashi* and *Korematsu*.

The majority equates the showing required to prove necessity for the internment with the showing required to render a wartime taking noncompensable. These are two distinct inquiries. The cases cited by the majority on the latter issue each dealt with property deliberately destroyed by American troops in battle in order to keep it from falling into the hands of approaching enemy troops. *United States v. Caltex, Inc.*, 344 U.S. 149 (1952); *United States v. Pacific Railroad*, 120 U.S. 227 (1887). There are other cases in which regulatory programs to ration or divert national resources in time of war have been held not to require compensation. *See, e.g., United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958). Neither of those circumstances describes the taking alleged in *Hohri*. Each involves a situ-

ation in which the taking was itself deemed necessary to the war effort. That is not the case here. No one has claimed that the government, having decided to conduct the relocation, could not have protected the property rights of those it evacuated.<sup>3</sup>

It seems unlikely to me, therefore, that the government could have won a takings suit on the claim of military necessity. It clearly would have been *impossible* for the government to win such a suit simply by citing *Korematsu* and moving to dismiss. Indeed, in *Central Eureka Mining Co.*, the Court emphasized that the question of whether a taking has occurred turns "upon the particular circumstances of each case." 357 U.S. at 168. The majority notes that certainty of success is not a necessary prerequisite to the running of the statute of limitations. *Hohri*, 782 F.2d at 253 n.68. For the panel majority to persist in stating that any such claim would have foundered at the pleading stage, it must go so far as to hold that there was certainty of defeat. That cannot be true without the sort of broad holding it now denies having made.

That being so, one of two conclusions follows. Either the panel majority rests on a narrow view of *Korematsu*, as it now claims, which means that the statute of limitations has long since run and this case was wrongly decided, or the panel majority has indeed created a rule of absolute and permanent deference to a claim of military necessity. The deference must be so sweeping that any harm attendant upon the relocation, however unnecessarily inflicted and however unrelated itself to any military necessity, is also utterly immune from any lawsuit.

<sup>3</sup> Any indication in the legislative history of the American-Japanese Evacuation Claims Act, 50 U.S.C. app. § 1981 *et seq.* (1982), that *Congress* did not believe compensation was required is of course irrelevant. The question of whether a taking has occurred is a purely legal one—unless the majority meant to suggest that absolute deference to the political branches is required in this context as well. See *Hohri*, 782 F.2d at 237-39.

A principle that broad, unfortunately, is essential to the result the panel majority reached. I thus do not exaggerate the holding of this case.

The panel majority claims that a confession of error by either Congress or the Executive was necessary before the present suit could be maintained. If a takings claim had been brought years ago, and if the court did not hold that *anything* done to persons subject to relocation was immunized by *Hirabayashi* and *Korematsu*, then the government would have been put to the proof of its defenses. As I have said, I cannot imagine that the government would have claimed that military necessity also required the loss of homes and businesses. Indeed, if the government reacted as it has now, it would have had to admit that there was no evidence supporting the claim of military necessity for the relocation, much less for the taking. Thus, even if the legal justification for the relocation were identical to that needed to render a taking noncompensable, which it is not, and a statement from the political branches necessary, which it is not, and the statement from President Ford irrelevant, which it is not, the statement by one of the "war-making branches" the panel majority requires could have been extracted through litigation. This means that this suit could have been brought successfully at any time within the past forty years and that the six-year limitations period has long since passed.

\* \* \* \*

I am entirely confident that the panel majority would not follow its rule of absolute deference should a similar circumstance arise in the future. That prediction is certain because the rule was created to rectify, so far as that can now be done, an injustice in the past. But, if that is true, the evasion of the statute of limitations stands revealed as unprincipled. Worse, there may be other times of emergency in our future, times when racial or ethnic animosities surface, and today's precedent will be available to any court reluctant to examine



a claim of military necessity supported by popular passion. The panel majority has purchased freedom from the statute of limitations at an unacceptable price. A panel majority that so obviously disapproves of the wartime internment ought to have been more reluctant to create a legal basis for rendering any similar future incident forever unreviewable in any of its consequences.

## II.

There are other grounds for rehearing this case as well. This court was without jurisdiction. The majority has completely reordered Congress' division of jurisdiction between the United States Court of Appeals for the Federal Circuit and the regional courts of appeals. The panel majority's conclusion that this court had jurisdiction over the appeal rested on its construction of the Federal Courts Improvement Act, 28 U.S.C. § 1295(a)(2) (1982), which provides that the United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction over an appeal from a final decision by a district court when

the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title.

28 U.S.C. §§ 1291, 1292, 1294 (1982) all provide for appeals to the regional courts of appeals, each provision noting as well, however, that the Federal Circuit retains jurisdiction in all cases so described in the Federal Courts Improvement Act. The jurisdictional controversy in *Hohri* arose from the fact that plaintiffs' original complaint included both a Takings Clause claim, under 28

U.S.C. § 1346(a)(2) (1982) (the Tucker Act), and a Federal Tort Claims Act claim, under 28 U.S.C. § 1346(b) (1982).

## A.

The initial question is whether a suit based upon both the Tucker Act and the Federal Tort Claims Act must be appealed to the Federal Circuit or to a regional court of appeals. It is clear, both upon textual analysis and analysis of congressional policy, that this appeal belonged in the Federal Circuit. The majority concluded that while the general rule provides that the Court of Appeals for the Federal Circuit has exclusive jurisdiction over any appeal from a claim based "in whole or in part" on the Tucker Act—as this one was—the general rule is nevertheless inapplicable when the claim is also based in part on any of the provisions listed after the word "except" in the portion of the Federal Courts Improvement Act quoted above. Thus, the statute is read, most implausibly, to say that a suit based in whole or in part on the Tucker Act must be appealed to the Federal Circuit, unless it is also based in part on the Federal Tort Claims Act, in which case it must be appealed to one of the twelve regional courts of appeals. Though no coherent policy underlies such a jurisdictional scheme, this conclusion was based entirely on the majority's understanding of the "plain meaning" of the Federal Courts Improvement Act.

I believe the better, indeed the only plausible, interpretation of the "except" clause is that it states an exception, not, as the majority supposes, a new, independent, and superseding rule. The controlling sentence of the Federal Courts Improvement Act, read in its entirety, simply provides that a claim based in part on section 1346—other than those parts of section 1346 listed in the "except" clause—may only be appealed to the Federal Circuit. Save when taxation is involved, the Tucker Act is not found in the "except" clause. Therefore, the appeal



in this case, which is based in part on the Tucker Act and does not involve taxation, belonged in the Federal Circuit. The majority, however, interpreted the statute so that a Federal Tort Claims Act count overrides the presence of a Tucker Act count and affirmatively requires the case to be heard by the regional courts of appeals and not by the Federal Circuit. That stands the statute on its head.

The majority's reading also fails to explain the remarkable coincidence that all the provisions listed after the word "except" are subsections of the provision listed before the word "except"—section 1346. (This is true as well of the jurisdictional grant in the preceding paragraph of the Federal Courts Improvement Act, 28 U.S.C. § 1295(a)(1) (1982), which is similarly structured and provides for exclusive jurisdiction in the Federal Circuit for appeals arising under 28 U.S.C. § 1338 (1982), *except* for certain claims arising under section 1338(a).) If the purpose of the "except" clause, as the majority believed, were to list those provisions whose presence in a complaint Congress felt ought to shift review of a suit based in part on the Tucker Act to the regional courts of appeals, there is absolutely no reason to suppose that all those provisions would happen to be found within section 1346. Under the reading I suggest, of course, it would have made no sense to include any provision outside of section 1346 in the "except" clause, since that clause simply carves out of a general rule that applies by its terms to all of section 1346 those subsections of section 1346 to which that rule is not to apply.

An examination of the provisions listed in the "except" clause demonstrates how unlikely it is that Congress intended the meaning adopted in the majority opinion. Those provisions deal with tort claims against the government, suits to quiet title, and certain types of tax cases. One of the principal purposes of the Federal Courts Improvement Act was to centralize jurisdiction

in one forum "over appeals in areas of law where Congress determines there is a special need for nationwide uniformity." S. Rep. No. 275, 97th Cong., 1st Sess. 2 (1981), *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 12. Under the majority's interpretation, we must presume that the Congress thought nationwide jurisdiction and uniform decisionmaking with respect to Tucker Act claims to be so important that it provided that any case including such a claim would go, in its entirety, straight to the Federal Circuit, even though the case contains a due process claim, or an equal protection claim, or any of numerous other important constitutional and statutory claims—unless it also contains a claim to quiet title. Members of Congress must therefore have thought that the vesting of jurisdiction over appeals involving actions to quiet title in the twelve regional courts of appeals was so important that it overrode their clearly articulated desire to place Tucker Act appeals within the exclusive jurisdiction of the Federal Circuit. Such a jurisdictional scheme, as Chief Judge Markey pointed out in his dissent, would be "senseless." 782 F.2d at 257 (Markey, C.J., dissenting).

The majority opinion nonetheless seeks to bring some theoretical sense to its interpretation by suggesting that Congress placed Federal Tort Claims Act claims within the "except" clause because it "did not want to centralize adjudication of cases involving tort claims." 782 F.2d at 241 n.30. That is undoubtedly correct, and it explains why Congress provided in the Federal Courts Improvement Act that a federal tort claim, standing alone, would be heard by the regional courts of appeals. Similarly, Congress apparently saw no need to require the centralization of actions to quiet title, or of those tax cases it exempted from the general rule by listing them in the "except" clause. The majority takes a substantial and unwarranted step, however, when it reasons that Congress not only "did not want to centralize" such claims, but affirmatively sought to decentralize them as well, to

the point of sacrificing the principal goal of the Federal Courts Improvement Act—to centralize patent and Tucker Act claims by vesting exclusive jurisdiction over such appeals in the Federal Circuit. In so doing, the majority ignored language to the contrary in both the Senate and the House Reports accompanying the Federal Courts Improvement Act. The Senate Report expressly states that the Federal Circuit will have exclusive jurisdiction over “all patent appeals and all appeals in federal contract cases brought against the United States that are presently heard in the regional courts of appeals.” S. Rep. No. 275, *supra*, at 7 (emphasis added). The House Report formulates the rule much the way I do: the Federal Courts Improvement Act “gives the Court of Appeals for the Federal Circuit jurisdiction of any appeal from a trial court where the jurisdiction of the district court was based, in whole or in part, on section 1346 of title 28, United States Code, except 1346(a)(1) and (e) (tax appeals), 1346(b) (Federal Tort Claims), 1346(f) (quiet title actions), or 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue.” H.R. Rep. No. 312, 97th Cong., 1st Sess. 42 (1981). This makes it clear that the claims in the “except” clause are those whose presence do not vest jurisdiction in the Federal Circuit and not, as the majority thinks, those whose presence removes jurisdiction that would otherwise vest in that court. These congressional descriptions of the workings of the Federal Courts Improvement Act are much more consistent with the interpretation I offer than with that suggested by the majority. I think those descriptions are the correct ones. For these reasons, and for those cogently stated by Chief Judge Markey, I believe that the panel decided this issue wrongly.

#### B.

The majority’s disposition of the jurisdiction question was wrong for an additional reason: the federal tort

claim, which under the majority’s analysis was the sole reason for finding jurisdiction in this court to hear the appeal, was itself dismissed by the district court for lack of jurisdiction. *Hohri v. United States*, 586 F.Supp. 769, 793 (D.D.C. 1984). That dismissal was affirmed by the panel that decided this appeal. *Hohri*, 782 F.2d at 245. Our jurisdiction to hear the entire case therefore rested entirely on a claim over which we had no jurisdiction.

The majority’s rationale is impossible to understand. It held that although the court was without jurisdiction to hear the federal tort claim, that claim was not frivolous, except for the lack of jurisdiction, and therefore could serve as the predicate for jurisdiction in this circuit over the remainder of the case. The majority never justified or supported its reliance on the presumed absence of frivolity in the tort claim, regardless of its jurisdictional deficiency, in asserting jurisdiction over the entire case by virtue of the presence of that claim in the original complaint.<sup>4</sup>

In any event, the federal tort claim in this case was clearly frivolous. As the panel noted, the plaintiffs failed to comply with the explicit and mandatory statutory directive requiring that federal tort claims be filed first with the appropriate government agency. It may be true, as the majority stated, that there was no bad faith involved, although the basis for that conclusion escapes me.

<sup>4</sup> The only case cited in support of this argument was *Doe v. United States Department of Justice*, 753 F.2d 1092 (D.C. Cir. 1985). As the majority presumably recognized, since it cited *Doe* with a *cf.*, the case is probably inapposite. *Doe* involved the interpretation of a different statutory clause than did *Hohri*. Moreover, to the extent that it is relevant, it *undermines* the majority’s frivolity-based rule, since *Doe* adopted a rule based on the presence or absence of jurisdiction. See *Von Drasek v. Lehman*, 762 F.2d 1065, 1069 (D.C. Cir. 1985) (noting that in *Doe*, “[b]ecause [the district court] did not have jurisdiction to hear the back pay claim, the jurisdiction of the district court could not have been based, even in part, on the Tucker Act”).



The claim remains frivolous, however, because no non-frivolous legal arguments may be made in its defense. That is why, I suppose, the frivolity-based rule as formulated by the majority permits jurisdiction in this court when the federal tort claim is not "*substantively* far-fetched." *Hohri*, 782 F.2d at 240 n.27 (emphasis added). It is thus now the law of this circuit that such claims can be predicates for jurisdiction when, as to that claim, plaintiffs lack standing, or the claim is moot, or the most basic procedural requirements are ignored, provided the merits of the *underlying* claim are not "farfetched." I cannot imagine a rationale for this inventive rule, save that it allowed the majority to decide this appeal.

### C.

I think this decision was an unfortunate one, and would have preferred to see its plain errors corrected by this court sitting *en banc*. Since only five judges—one short of the necessary majority—voted to rehear, the task falls instead to the Supreme Court, or perhaps to the United States Court of Appeals for the Federal Circuit. As the majority indicates, any appeal from the proceedings on remand will be to the Federal Circuit, since the Tucker Act claim is all that remains. The majority suggested in *dicta* that its decision constitutes "law of the case," binding the Federal Circuit unless the panel of that court that hears the second appeal finds both "clear error" and "manifest injustice" in the prior opinion. *Hohri*, 782 F.2d at 241 n.31. The majority failed to consider what effect the deficiency of its *jurisdictional* holding has on the respect due its holding on the merits by another circuit court. As the Supreme Court has explained, "[l]aw of the case directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618 (1983). This court has held that a decision by a prior panel that subject-matter jurisdiction exists over a case may be departed from by a later panel in the

same case. There need have been no intervening changes in the facts or the law; it is sufficient justification that the second panel determines that jurisdiction is lacking. See *Potomac Passengers Association v. Chesapeake & O.R.R.*, 520 F.2d 91 (D.C. Cir. 1975). For much the same reason that a court will be unwilling to issue a judgment when it lacks jurisdiction itself, so too, it would seem, may it exercise its discretion to refuse to resolve a case on the basis of a prior opinion issued by another court without jurisdiction. Indeed, even within the doctrine of *res judicata*, which accords the court far *less* discretion and which generally gives preclusive effect even to judgments issued by courts without subject-matter jurisdiction, such effect will not be given when "[t]he subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority" or when "[a]llowing the judgment to stand would substantially infringe the authority of another tribunal." *Restatement (Second) of Judgments* § 12 (1982). I do not pretend to advise the Federal Circuit whether it should exercise its discretion to depart from the law of the case in circumstances such as those here. Should the proceedings on remand be appealed, the issue will undoubtedly be briefed and argued. I merely note that the matter is not at all as simple as the majority suggests, and that on this as on so many of the other issues resolved by the majority, I would have reached the opposite conclusion.

This case illustrates the costs to the legal system when compassion displaces law. The panel majority says it is not too late for justice to be done. But we administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law. The wartime internment around which this case revolves is undeniably a very troublesome part of our history. It is within the authority of the political branches to make whatever reparations they deem appro-



priate, and it is my understanding that such legislation is presently under consideration. The issue of whether an additional remedy is available from a court, and, if so, which court, should only be resolved on the basis of a sober and fair assessment of the legal claims presented. When a court relies instead on a plainly deficient analysis, it fails to do justice to the parties before it, and inevitably establishes those deficiencies as precedent. The temptation to do so, in service of an attractive outcome, is often strong. The panel opinion in this case, which completely disrupts a carefully crafted jurisdictional scheme while establishing several unfounded and undesirable precedents as law, demonstrates why such temptations ought to be resisted.

Statement of *Circuit Judge* WRIGHT and *Circuit Judge* GINSBURG.

WRIGHT and GINSBURG, *Circuit Judges*: The dissenters indicate their readiness to scrutinize pleas of "military necessity" with due rigor and care, even in "times of emergency in our future," even when "utter capitulation" is "supported by popular passion." See diss. at 2, 10. We praise that stance, concur in it, and write only to inter the dissenters' most grave misunderstanding that our opinion holds anything to the contrary.

The panel majority opinion deals particularly and precisely with the special facts of an extraordinary episode of injustice. It most assuredly "creates [no] rule of absolute and permanent judicial deference to *any* claim of 'military necessity.'" *Id.* at 2 (emphasis altered). Rather, the opinion simply describes and turns on what we find to be the situation-specific holding of *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944): courts must defer to the judgment of Congress and the Executive that sufficient military necessity existed to justify the *World War II internment policy*. That Supreme Court holding seems to us clear, pin-pointed, and definite. We therefore concluded that the former internees faced an insuperable obstacle to the present suit until the "war-making branches," *Korematsu*, 323 U.S. at 218-19, released the federal courts from the grasp of *Korematsu* and *Hirabayashi* by indicating that deference was no longer due to the wartime judgment of military necessity for the mass evacuation.<sup>1</sup>

<sup>1</sup> The dissenters also maintain that, although *Korematsu* and *Hirabayashi* may have established the military necessity of confining the Japanese-Americans to internment camps, those cases did not establish the military necessity of the takings at issue in this case. See diss. at 7. In making this argument, the dissenters presume that the taking of property and the confining of the Japanese-Americans are properly analyzed as separate and distinct actions. In fact, however, the taking of property was part and

Our opinion, read as we conceived it and not as the dissenters would have it, does not stretch beyond the setting in which it is embedded. We did not announce a general rule of automatic judicial capitulation to the military's claims of military necessity. We ruled narrowly, specifically, and only that when the Supreme Court has definitively held that deference to a military judgment is due in a particular case, litigants may not reasonably be required to re-litigate that issue in advance of a green light from the "war-making branches."<sup>2</sup>

parcel of the internment policy; that policy included not simply confining United States citizens but, necessarily adjunct to that action, forcing them to leave their property behind under military supervision. The losses that occurred under military supervision were therefore sustained under the very internment policy that the Supreme Court held justified by military necessity.

The dissenters also argue that the wartime cases either held only that the specific—non-takings clause—claims then before the court were not ones upon which relief could be granted, or that courts owe absolute and permanent deference to military judgments about military necessity at all times. We have adopted neither view. Instead, we read the wartime cases to have established the military necessity of the internment policy for both the particular claims at issue in those cases and the takings clause claims now before the court. *See Hohri v. United States*, 782 F.2d 227, 250-53 (D.C. Cir. 1986). We believe our reading to be historically faithful to the argument and ethos of the wartime cases, while avoiding the gross overgeneralizations or artificial narrowness suggested by the dissenters.

<sup>2</sup> The dissenters argue that President Ford's Proclamation No. 4417, 33 C.F.R. 8 (1977), provided such a green light. *See diss.* at 5 n.1. As the panel majority opinion points out, that proclamation announces merely that the internment policy was *morally*, not legally, wrong. *See Hohri*, 782 F.2d at 253 n.67. The dissent, however, maintains that if the policy were morally wrong, then it must not have been "necessary." *Diss.* at 5 n.1. This argument confuses the nature of the "necessity" involved. It may be true, as the dissent suggests, that necessity in the sense of absolute coercion is a complete moral excuse. But the government has never claimed that it was under absolute coercion to implement the policy. Rather, the "war-making branches" made the judgment that sufficient mili-

The dissenters also suggest that *Korematsu* and *Hirabayashi* may best be understood as erroneous decisions made under the pressures of wartime. If these cases had come up in peacetime or if their validity were reconsidered in peacetime, the dissenters appear to advise, the Supreme Court might well have ruled the internment policy unconstitutional. Therefore, the former internees should presumably have brought this case at some undefined point after the war when the "emergency [was] long past" and the mood of the Court had sufficiently changed. *See diss.* at 2, 3-4. In making that argument, the dissenters overlook this reality: litigants do not have the academic luxury of indulging the belief that they can lay a solid foundation for their in-court pleas by insisting that the Supreme Court does not really mean what it says, or that a peacetime Court should not hesitate to repudiate a wartime Court for ignoring the Constitution's requirements. The dissenters' double standard would thus preclude the former internees from ever obtaining judicial redress: the validity of the internment may have been tested originally by the deferential standard imposed by wartime pressures, but we should nonetheless measure the tolling of the statute of limitations with the dissenters' more searching standard in mind. We do not believe that the policies served by a statute of limitations inexorably require courts to subject litigants to such a vicious whipsaw.

As to remaining portions of the dissent from denial of rehearing en banc, we pass by restatements of the panel dissenter's opinion, along with much of the current dissenters' rhetorical excess, and make only these points.

tary need existed to justify the policy. The policy was thus necessary, not in an absolute sense, but in a relative one: it was necessary to military ends then deemed important enough to outweigh the harm to the internees. Therefore, the policy may well have been both morally wrong (in the sense that the moral wrongs outweighed the military need) and legally "necessary" (in the sense that the military need outweighed the harm to legal rights).



First, the legislative provision on the proper forum for appellate review, 28 U.S.C. § 1295(a)(2), all will agree, is densely composed. As Judge Markey observed in his dissent from the panel decision, see *Hohri v. United States*, 782 F.2d 227, 260 (D.C. Cir. 1986), the section has been a source of confusion. See *Professional Managers' Association v. United States*, 761 F.2d 740, 745 (D.C. Cir. 1985) (Section 1295(a)(2) "has recently been the source of much confusion in our court."). The differences of view presented in this case and others, compare *Squillacote v. United States*, 747 F.2d 432 (7th Cir. 1984), cert. denied, 105 S.Ct. 2021 (1985) (courts may depart from strict statutory language to promote statutory goals of judicial efficiency and fairness) with *Professional Managers' Association*, 761 F.2d at 745 (declining to adopt the *Squillacote* approach), suggest that Congress should attend to the technical amendment of section 1295(a)(2) that would obviate court conflicts.

The dissenters lean with a heavy hand on the district court's "lack of jurisdiction" to hear the tort claims appellants sought to present. We note that the flaw blocking presentation of the tort claims is a textbook illustration of "jurisdiction writ small." See *United States v. Kember*, 648 F.2d 1354, 1357-59 (D.C. Cir. 1980). We did not label "frivolous" "[a]ppellants' failure to grasp in full the distinction between [administrative complaint] filing requirements that are non-waivable and those that are subject to waiver on equitable grounds." *Hohri*, 782 F.2d at 240 n.27. Whether we were correct or incorrect in that judgment, however, we certainly did not lay down "law of this circuit" that plaintiffs who plainly "lack standing," or present claims that are clearly "moot," or flout "the most basic procedural requirements" can nonetheless escape characterization of their case as "frivolous." But see diss. at 16.<sup>3</sup>

<sup>3</sup> On another day, in another case, the author of the present dissent from denial of rehearing en banc took his colleagues to

We note finally the dissenters' apparent misperception of Restatement black letter. The Restatement (Second) of Judgments §§ 11, 12 (1982), discourages second hearings even on questions of "subject matter jurisdiction," and warns against expansive reading of the subsections set out by the dissenters. See diss. at 17. Suffice it to say that the question of D.C. Circuit or Federal Circuit review with which we deal entails no "[m]anifest defect[]" such as the granting of a divorce by a justice of the peace, a federal court entertaining what is plainly a common law tort action between citizens of the same state, intrusion upon the jurisdiction of a tribunal of legally superior authority, improper judicial interference with a non-judicial agency, or disturbance of other interests that genuinely warrant classification as "fundamental." See *id.* at § 11 comment e; § 12 Reporter's Note. Here again we believe that the dissenters have succumbed to the temptation to overstate and overwrite. We do not think our view of this singular case warrants the extravagant attack mounted against it.

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task for extravagant attribution of significance to his panel opinion. See *Dronenburg v. Zech*, 746 F.2d 1579, 1582-84 (1984) (en banc) (separate statement of Bork, J.). We agreed with him on that occasion that the temptation to exaggerate a decision with which one disagrees, thereby to make it an easy target for slings and arrows, ought to be resisted.



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 83-0750

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WILLIAM HOHRI, *et al.*, PLAINTIFFS

*v.*

UNITED STATES OF AMERICA, DEFENDANT

FILED

May 17, 1984

**ORDER**

For the reasons stated in the accompanying Memorandum, it is this 17th day of May, 1984, hereby

ORDERED: that defendant's motion to dismiss should be, and hereby is, GRANTED; and it is further

ORDERED: that plaintiffs' complaint should be, and hereby is, DISMISSED.

/s/ Louis F. Oberdorfer  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 83-0750

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WILLIAM HOHRI, *et al.*, PLAINTIFFS

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FILED

May 17, 1984

**MEMORANDUM**

During World War II, the United States government removed some 120,000 American citizens and residents of Japanese ancestry from their West Coast homes and placed them in internment camps for up to four years. The stated reason for this unprecedented policy of evacuation and incarceration was "military necessity": the Nation was at war with Japan, and military officials feared that members of the American Japanese population would engage in sabotage, espionage, and other activities harmful to the war effort.

In 1983, nineteen individuals who were interned during the war or descended from internees and an organization of Japanese Americans filed this suit against the United States.<sup>1</sup> They allege that the program of exclusion and

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<sup>1</sup> Plaintiffs have moved for class action certification, defining the class as the approximately 120,000 citizens and permanent residents, and representatives of such persons no longer living, who were "subjected to forcible segregation, arrest, exclusion, imprisonment, curfew and travel restrictions, deportation, loss of citizenship, or

internment was wrongful and seek compensation for injuries suffered as a result of it. They claim that there was no military necessity for the program and that it was instead motivated by "race prejudice, war hysteria, and a failure of political leadership."<sup>2</sup> Furthermore, they allege that government and military officials were aware of this lack of military justification but conspired to suppress that information when the program was implemented, when it was later challenged in court, and, in fact, almost to the present. Plaintiffs claim to have suffered deprivation of their constitutional rights, loss of homes, businesses, educations, and careers, physical and psychological injuries, including loss of life, destruction of family ties, and personal stigma. The complaint contains twenty-two counts; each plaintiff seeks compensatory damages for each tort claim and \$10,000 for each cause of action not sounding in tort.<sup>3</sup>

The defendant United States has moved to dismiss plaintiffs' claims for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. That motion proceeds on three grounds. First, defendant asserts that plaintiffs' action is barred

other deprivations of their civil rights and liberties" because of their Japanese ancestry pursuant to actions and orders of the United States. Plaintiffs' Motion for Class Action Certification (June 14, 1983). By agreement of the parties, decision on the class action motion has been postponed pending resolution of defendant's motion to dismiss.

<sup>2</sup> Complaint, ¶ 3 (quoting Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 18 (1982)). The Commission was established by act of Congress in 1980 to review the treatment of Japanese Americans during World War II and recommend appropriate remedies. Its report, which concludes that there was no military necessity for the program and that this fact was known by responsible officials during the war, is in large part the genesis of this suit. See Plaintiffs' Supplemental Memorandum on the Statute of Limitations at 2-3 (Jan. 20, 1984).

<sup>3</sup> Plaintiffs also seek relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the All Writs Act, 28 U.S.C. § 1651.

by the applicable statutes of limitation. Second, defendant alleges that the American-Japanese Evacuation claims Act, 50 U.S.C. App. §§ 1981-1987, is the exclusive remedy for claims arising from the internment program. Third, defendant asserts that there is no constitutional provision, statute, or regulation that waives the federal government's sovereign immunity against these claims for money damages.<sup>4</sup>

Plaintiffs oppose the motion to dismiss. They claim that alleged suppression by defendant of information contradicting the military necessity rationale constituted fraud sufficient to toll the running of the statutes of limitation. They dispute that the Evacuation Claims Act is exclusive of other remedies, because it fails to comport with constitutional standards of due process, just compensation, and equal protection. Finally, they point to several statutes and constitutional provisions which they claim act to waive the federal government's sovereign immunity against this suit.

## I.

In evaluating a motion to dismiss under Rule 12(b)(1), a court must construe the allegations of the complaint "favorably to the pleader." *Walker v. Jones*, No. 83-1425, slip op. at 3 (D.C. Cir. May 1, 1984) (quoting

<sup>4</sup> An affirmative defense such as a bar by a statute of limitations normally is raised through a motion to dismiss based on Rule 12(b)(6). In this suit against the United States, however, the relevant statutes of limitation are conditions placed on waivers of sovereign immunity. As such, their expiration would deprive the Court of subject matter jurisdiction. In that case, a statute of limitations defense would be raised through a motion to dismiss based on Rule 12(b)(1). See *D.C. Transit System, Inc. v. United States*, 717 F.2d 1438, 1440 n.1 (D.C. Cir. 1983); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1350, at 139-40 (Supp. 1984). Defendant cites both rules in support of its motion. This ruling is based on Rule 12(b)(1).

Defendant also moves to dismiss for improper venue under Rule 12(b)(3). The Court does not reach that question.



*Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). In addition, a court may consider material outside the pleadings, such as official documents, matters of general public record, and historical publications. See 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1350, at 549-50 (1969). The following recitation of the facts is drawn from plaintiffs' complaint, official documents attached as exhibits to the complaint, the 1982 report of the Commission on Wartime Relocation and Internment of Civilians,<sup>5</sup> and other published historical accounts cited by the parties.

The use of official historic documents is particularly appropriate here. They relate to events which occurred more than forty years ago. Most of the actors who might give better evidence are no longer living. It is unlikely that the historical facts recounted in the documents can ever be the subject of a material dispute. Moreover, although the government could offer the documents to support its defense, they are more embarrassing to the government than self-serving. Accordingly, the document have been considered in ruling on this motion to dismiss for lack of subject matter jurisdiction. See *Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1118 n.29 (9th Cir.), *cert. denied*, 103 S.Ct. 570 (1982).

#### A.

On December 7, 1941, a carrier-based force of Japanese aircraft attacked the American fleet at Pearl Harbor, inflicting heavy losses. The next day, the United States declared war on Japan. Steps to control the activities of Japanese nationals in the United States began immediately. On December 8, President Roosevelt proclaimed that residents of Japanese nationality were "alien enemies." Proclamation No. 2525, 6 Fed. Reg. 6321 (1941). The proclamation authorized the Attorney General to regulate their conduct and to apprehend any such persons

"deemed dangerous to the public health or safety of the United States."<sup>6</sup> Pursuant to other proclamations, cameras, weapons, radio transmitters, and other instruments of possible sabotage and espionage that belonged to enemy aliens were confiscated. Internment of alien enemies—Japanese, German, and Italian—who were believed to be dangerous began immediately. In late January and early February, the Attorney General ordered that enemy aliens could not enter some 84 designated areas of military significance on the West Coast.

These restrictions, however, did not satisfy Lieutenant General John L. DeWitt, who as Commanding General of the Western Defense Command was responsible for West Coast security. The general urged that military necessity required increasing the geographic area of exclusion and barring American citizens, as well as aliens, of Japanese descent. In this, he was supported by public officials and popular opinion on the West Coast, where there was a history of antagonism toward the Japanese. Consultation among members of the Western Defense Command, the War Department, and the Justice Department culminated with a formal recommendation by General DeWitt to Secretary of War Henry L. Stimson "for the evacuation of Japanese and other subversive persons from the Pacific Coast." *Final Recommendation of the Commanding General, Western Defense Command and Fourth Army to the Secretary of War* (Feb. 14, 1942) (Complaint, Exhibit G). On February 18, officials of the War and Justice Departments met to draft such an order, and it was signed by President Roosevelt on February 19 as Executive Order 9066, 7 Fed. Reg. 1407 (Complaint, Exhibit H).

Executive Order 9066 authorized the Secretary of War and military commanders to whom he delegated authority to prescribe "military areas" from which any persons

<sup>5</sup> Hereinafter cited as *Personal Justice Denied*.

<sup>6</sup> German and Italian aliens were given the same status in Proclamation Nos. 2526, 2527, 6 Fed. Reg. 6323, 6324 (1941).



could be excluded.<sup>7</sup> The next day, Secretary of War Stimson delegated his authority under Executive Order 9066 to General DeWitt. Within ten days, DeWitt designated the western halves of California, Oregon, and Washington and the southern third of Arizona as "military areas" from which all persons of Japanese ancestry were to be removed. Later, he expanded the evacuation area to include the rest of California.

Relocation was tried first on a voluntary basis. Japanese Americans were instructed to move outside the military areas but were free to go wherever they chose. At the same time, curfews and reporting requirements were imposed. The voluntary program quickly proved unworkable. Objections to receiving "potential saboteurs and spies" were raised by officials of interior western states where evacuees resettled. Movement was slow, since many evacuees had trouble selling homes and businesses and finding new housing and means of livelihood. It was soon determined that relocation should be mandatory.

To that end, President Roosevelt issued Executive Order 9102, 7 Fed. Reg. 2165 (Mar. 20, 1942), which established the War Relocation Authority (WRA) and authorized it "to provide for the removal from designated areas of persons whose removal is necessary in the interest of national security. . . ." Under the new evacuation plan, the Army was to remove the Japanese Americans from designated military areas to temporary assembly centers, where they would be assigned to permanent camps run by the WRA. The relocation began near Seattle on March 24. By August 7, some 108 Civilian Exclusion Orders had been issued, resulting in the evacuation of about 92,000 people to assembly centers, where they

<sup>7</sup> Congress ratified the President's action one month later by enacting Pub. L. No. 503, 56 Stat. 173 (codified at 18 U.S.C. § 97a (1946)). That statute authorized the arrest, fine, and imprisonment of anyone violating an order issued pursuant to Executive Order 9066. See *Hirabayashi v. United States*, 320 U.S. 81, 91 (1943).

remained for an average of about 100 days before moving to relocation camps. Some 70 percent were citizens of the United States.

Evacuees were given as little as forty-eight hours notice of an impending evacuation. According to the exclusion orders, government-run "Civil Control Stations" were to "provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property including: real estate, business and professional equipment, buildings, household goods, boats, automobiles, livestock, etc." In addition, the government stated that it would provide for storage at the owner's risk of substantial household items and other belongings packed in crates. See, e.g., Civil Exclusion Order No. 5 (Apr. 1, 1942) (Complaint, Exhibit I).

There were sixteen assembly centers, all but three in California. Generally, assembly centers were organized around "blocks," a group of living units housing 600 to 800 people. Each block had showers, lavatories, toilets, and in most cases its own mess hall. The camps themselves were surrounded by fences and search lights and secured by military and internal police.

The transfer of evacuees from assembly centers to permanent relocation camps began in May 1942; by its completion, the WRA would have some 120,000 individuals in its custody. There were ten camps, built on federal land in Utah, Arizona, Colorado, Wyoming, Arkansas, Idaho, and California. Several of the sites were located in arid desert land, and most suffered from severe weather conditions at some time during the year. The camps were surrounded by barbed wire, watchtowers, and armed guards. Living accommodations were arranged in the block style. Typically, one block contained twelve to fourteen barracks, a mess hall, baths, showers, toilets, a laundry and a recreation hall. Each barrack has 2000 to 2400 square feet of floor space and was divided into four to six rooms. One room would house a family, sometimes two. Employment outside the centers was not permitted;

work was made available at the centers for \$12 to \$19 a month. Food, shelter, medical care, and education were provided to the evacuees free of charge, but even when their value was added to the low salaries, the economic hardship imposed by the internment was obvious.

Initially, no evacuee was allowed to leave the center except in emergencies, and then only in the company of a non-Japanese escort. Soon exceptions were made for evacuees to continue their college educations in the interior and to provide farm labor. By October, 1942, a formal leave system had been instituted that allowed short-term leave, work group leave for seasonal employment, and indefinite leave—the equivalent of relocation—for educational, employment, or other reasons. The next year, government officials adopted a more sweeping release plan in order to enlist Japanese Americans as soldiers. In February 1943, a "loyalty" questionnaire was administered to all evacuees over seventeen years of age. The information provided by these questionnaires was used to determine eligibility for enlistment and for leave and relocation outside the camps.

As the leave and relocation plans went into effect, the government moved to isolate evacuees who were viewed as security risks. The relocation center in Tule Lake, California, was designated to receive persons who "by their acts have indicated that their loyalties lie with Japan during the present hostilities or that their loyalties do not lie with the United States." *Personal Justice Denied* at 208 (quoting WRA Administrative Instruction No. 100 (July 15, 1943); WRA Administrative Manual § 110.1 (Oct. 6, 1943)). This included individuals who had applied for expatriation or repatriation to Japan, those who did not answer yes to the loyalty questionnaire, or those who were suspect for other reasons. Security measures around the camp were reinforced, including the addition of six tanks. Facilities were overcrowded, and numerous disturbances broke out. *Personal Justice Denied* at 209.

The implementation of the loyalty review and release program prompted a heated debate between the War Department and the Western Defense Command over continued exclusion of Japanese Americans from the West Coast. General DeWitt took the position that loyal Japanese Americans could not be separated from disloyal, so that all should be excluded; he argued in addition that public opinion would not support such a reversal in policy. Officials in the War Department urged that the loyal could be distinguished from the disloyal. After Pearl Harbor, there had been insufficient time to do so. But now that loyalty could be established on an individual basis through the loyalty questionnaire, they opposed continuing the exclusion.

The first significant breach in the policy of exclusion occurred in April 1943, when Japanese Americans in the armed forces were allowed to return to the West Coast on furlough. By Spring of 1944, efforts to end exclusion had gained momentum. In February, the WRA had been placed within the Interior Department, which opposed the evacuation. On May 26, 1944, Secretary of War Stimson proposed at a cabinet meeting that exclusion be ended. General Bonesteel, the new Commanding General of the Western Defense Command,<sup>8</sup> wrote to a War Department official on July 3, 1944, to state that there was no longer a military necessity for exclusion. The Navy concurred in that judgment in September. In fact, Bonesteel began on a small scale to allow Japanese Americans to return to the West Coast during the Spring of 1944.<sup>9</sup> President Roosevelt declined to do anything "drastic or sudden," however. In the opinion of the Commission on Wartime

<sup>8</sup> General DeWitt left the Western Defense Command in Fall 1943.

<sup>9</sup> Those permitted to return included individuals who had brought suit challenging their exclusion. It is alleged that these individuals were readmitted to moot their challenges. See *Personal Justice Denied* at 231-32.



Relocation, Roosevelt did not wish to impair his reelection chances in the West. *Personal Justice Denied* at 229.

The decision to lift the West Coast exclusion was made in a cabinet meeting on November 10, 1944, immediately following the election. The War Department publicly rescinded the mass exclusion order on December 17, 1944, although individual exclusions were continued in effect. The repatriation was slow; by August, 1945, when Japan surrendered, over half of the evacuated population remained in the United States' custody. Even though all individual exclusion orders and military restrictions against the Japanese were revoked on September 4, the last relocation camp was not closed until March 1946.

#### B.

The claims of military necessity that underlay the promulgation of Executive Order 9066 and its subsequent implementation are stated in two official reports filed by General DeWitt during the war: the *Final Recommendation of the Commanding General, Western Defense Command and Fourth Army, Submitted to The Secretary of War* and *Final Report: Japanese Evacuation from the West Coast 1942*. The *Final Recommendation*, submitted on February 14, 1942, stated that Japanese naval attacks on shipping and coastal cities were "probable," as were air raids and sabotage of vital installations within the Western Defense Command. It claimed that these enemy activities would be assisted by agents in the United States. The 112,000 individuals of Japanese ancestry living in the area were "potential enemies" because of their ties to Japan and were "at large today." DeWitt wrote

In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized", the racial strains are un-

diluted. To conclude otherwise is to expect that children born of white parents on Japanese soil sever all racial affinity and become loyal Japanese subjects, ready to fight and, if necessary, to die for Japan in a war against the nation of their parents. That Japan is allied with Germany and Italy in this struggle is no ground for assuming that any Japanese, barred from assimilation by convention as he is, though born and raised in the United States, will not turn against this nation when the final test of loyalty comes.

DeWitt claimed, without elaboration, that "indications" existed that these individuals were organized for concerted activity; "[t]he very fact no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."

DeWitt attempted to substantiate these claims in his *Final Report*.<sup>10</sup> Citing the United States' deteriorating military position in the Pacific theater, three isolated attacks on West Coast targets, and interference with Pacific shipping, DeWitt concluded that the West Coast was exposed to attack. DeWitt predicted that such an attack, if it came, would receive significant support from segments of the Japanese American population. To support this claim, he pointed to FBI raids on the premises of Japanese aliens immediately following Pearl Harbor which discovered ammunition, rifles, shotguns, and "maps of all kinds." *Final Report* at 8. He claimed there were hundreds of reports each night of signal lights visible from the coast and of unidentified radio transmissions. He noted that Japanese Americans, "by design or accident," had located many of their communities near vital installations. *Id.* at 9. And he repeated his racial arguments. The Japanese Americans, according to DeWitt, were

<sup>10</sup> The *Final Report* was dated June 5, 1943, but was not published until 1944.



a large, unassimilated, tightly-knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion . . . .

*Id.* at vii.<sup>11</sup> DeWitt claimed that hundreds of Japanese American organizations on the West Coast were actively advancing Japanese war aims and that thousands of American-born Japanese had been educated in Japan, where they were indoctrinated and became "rabidly pro-Japanese." *Id.* DeWitt contended that it was impossible to isolate these disloyal Japanese Americans from the loyal. Therefore, it was necessary to remove them all from the West Coast.

Dewitt's *Final Recommendation* and *Final Report* have been challenged for inaccuracy as well as racial animus. DeWitt's intelligence apparatus during the early part of the war was criticized for giving credence to every rumor. Major General Joseph W. Stilwell, who served under DeWitt in December 1941, stated that in the San Francisco headquarters of the Western Defense Command "Common sense is thrown to the winds and any absurdity is believed." *Personal Justice Denied* at 64. DeWitt's security concerns were contradicted by several other individuals and organizations doing intelligence work on the West Coast. In November 1941, President Roosevelt

<sup>11</sup> Even though the West Coast population included second and third generations of Japanese immigrants, DeWitt argued that the ties to Japan were undiluted. He expressed his opinions more explicitly before a House Committee on April 13, 1943, when he said:

I don't want any of them [the Japanese] here [on the West Coast]. They are a dangerous element. There is no way to determine their loyalty.

*Personal Justice Denied* at 221. The next day, in an off-the-record news conference that found its way into print, DeWitt stated that

As I told the War Department, the Japanese Government finding out we are bringing these men in, it is the ideal place to infiltrate men in uniform . . . . [A] Jap is a Jap.

*Id.* at 222.

and the War Department received a report from Curtis B. Munson, a Chicago businessman, who advised that "There is no Japanese 'problem' on the Coast. There will be no armed uprising of Japanese." C. Munson, *Japanese on the West Coast* (Complaint, Exhibit C). Munson thought it likely that covert agents would be "imported" from Japan and would not come from the local Japanese, who are "loyal to the United States or, at worst, hope that by remaining quiet they can avoid concentration camps or irresponsible mobs." He noted that potential sabotage suspects were already under surveillance. Due to a lack of strategic planning by the United States, however, Munson was unwilling to conclude that there was no danger from the Japanese living in the United States.

Munson's report was impressionistic; a detailed, complete analysis of the Japanese situation on the West Coasts was submitted to the Chief of Naval Operations on January 26, 1942, by Lieutenant Commander Kenneth D. Ringle, an expert on Japanese intelligence in the Office of Naval Intelligence. See K. Ringle, *Report on Japanese Question* (Complaint, Exhibit D). Ringle concluded that at least 75 percent of the American-born United States citizens of Japanese ancestry were loyal to the United States and that a large majority of the alien residents were at least "passively loyal." He identified those groups most suspected of disloyalty and estimated their number as a small fraction of the Japanese American population. He noted that the most dangerous of these individuals were already in custody and that most of the others were known to the FBI and other government organizations. He recommended immediate detention for the remainder of the dangerous element, both citizens and aliens. He urged, however, that the so-called "Japanese Problem" could be handled on an individual, not racial, basis. "[I]n short," he concluded, "the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people; . . . it is no more serious than the problems of the

German, Italian, and Communistic portion of the United States population. . . ." *Id.* at 3.

DeWitt's *Final Report* cited numerous reports of unauthorized radio and light signals on the West coast as evidence of the need for evacuation. Those claims were directly contradicted by reports DeWitt received from the Federal Communications Commission (FCC), which monitored transmissions on the West Coast and provided its findings on a continuous basis to DeWitt. According to an April 1944 letter from FCC Chairman James L. Fly to the Attorney General, the FCC's Radio Intelligence Division conducted a 24-hour surveillance of the entire radio spectrum from December 1941 to July 1, 1942. At the request of DeWitt, the Commission supplemented its sophisticated surveillance apparatus with mobile direction-finding intercept units to pick up ship-to-shore transmissions; upon investigation, no transmission was ever found to be "other than legitimate." DeWitt's *Final Report* claimed that reports of radio and light signaling were virtually eliminated after the evacuation. The FCC found that the number of reports was not affected by the evacuation. Finally, DeWitt had asserted in a memorandum to the Assistant to the Attorney General that he did not have the capacity to track down suspected transmitters to an area smaller than a city block. The FCC in fact had the capacity to pinpoint a transmitter to a particular room within a building. Letter from FCC Chairman James L. Fly to Attorney General Francis Biddle (Apr. 4, 1944) (Complaint, Exhibit E).

Federal Bureau of Investigation Director J. Edgar Hoover also denied that illicit shore-to-ship signaling had occurred early in the war. In a letter to the Attorney General dated February 7, 1944, Hoover said that every complaint of illicit signaling had been investigated and had revealed nothing. Hoover also said that there was no information that could link espionage activity ashore to Japanese attacks on ships leaving West Coast ports. M. Grodzins, *Americans Betrayed* 291 (1949).

## C.

Numerous aspects of the exclusion and internment program were challenged in civil and criminal proceedings during the war.<sup>12</sup> Several of those cases reached the Supreme Court, where the constitutionality of the government's treatment of Japanese Americans was tested. In *Hirabayashi v. United States*, 320 U.S. 81 (1943), the court considered whether the imposition of curfew regulations on Japanese Americans was a legitimate exercise of the constitutional power to wage war.<sup>13</sup> In *Korematsu v. United States*, 323 U.S. 214 (1944), the same issue was raised with respect to the decision to exclude Japanese Americans from the West Coast.<sup>14</sup>

The information gathered by the FBI, the FCC, and Naval Intelligence which minimized General DeWitt's theory of a mass threat gradually came to the Justice Department's attention as it prepared to defend these cases before the Supreme Court. Once in possession of these facts, Department officials disagreed among themselves about whether disclosure was required. That issue was initially raised by Edward Ennis, Director of the Justice Department's Alien Enemy Control Unit, during preparation of the *Hirabayashi* brief. Ennis, who had learned of Lieutenant Ringle's intelligence work,<sup>15</sup> summarized

<sup>12</sup> A partial listing of cases involving legal claims or defenses raised by Japanese Americans is given in Plaintiffs' Supplemental Memorandum on the Statute of Limitations (Jan. 20, 1984) (Exhibit A).

<sup>13</sup> A companion case, *Yasui v. United States*, 320 U.S. 115 (1943), was decided at the same time.

<sup>14</sup> In a third case, *Ex parte Endo*, 323 U.S. 283 (1944), the Court held that the WRA had no statutory authority to continue to detain concededly loyal citizens. The constitutional issue was not reached. A lengthy treatment of the legal strategies in these wartime cases can be found in P. Irons, *Justice at War* (1983).

<sup>15</sup> Ennis stated that he first learned of Ringle's views from an article by "An Intelligence Officer" in the October 1942 issue of



Ringle's conclusions about the "Japanese Problem" in a memorandum to the Solicitor General. See Memorandum from Ennis to Solicitor General Charles Fahy (Apr. 30, 1943) (Complaint, Exhibit J). Ennis then noted that the government planned to argue in *Hirabayashi* that mass evacuation was required because individual, selective evacuation would have been "impractical and insufficient." But, he pointed out, this argument was significantly undercut by the fact that "the only Intelligence agency responsible for advising Gen. DeWitt gave him advice directly to the contrary." Memorandum at 3. Ennis suggested that the Department had a duty to disclose the report to the Court. "[A]ny other course of conduct might approximate the suppression of evidence." *Id.* at 4.

Despite Ennis' memorandum, the *Hirabayashi* brief did not mention Ringle's conclusions.<sup>16</sup> The government instead argued that its actions were reasonable based on the gravity of the military situation following Pearl Harbor, the danger of an attack on the West Coast, the potential for sabotage by an unknown number of disloyal Japanese Americans, and the inability to determine loyalty on short notice. As evidence of these conclusions, the government cited the historic animus toward the Japanese on the West Coast, the substantial portion of the Japanese American population comprised of aliens, the prevalence of dual citizenship among Japanese Americans, their practice of Shintoism, which includes among its beliefs the divinity of the Japanese emperor, the large number of American-born children of Japanese parents who were educated in Japan or in Japanese language schools on the West Coast, and the links between West Coast Japanese

Harper's Magazine. Ennis subsequently procured a copy of a report that Ringle had prepared for the WRA based upon Ringle's earlier intelligence work. Ennis Memorandum at 1.

<sup>16</sup> The Harper's Magazine article was cited only for the proposition that Japanese Americans educated in Japan would probably be intensely loyal to that country. Brief for the United States at 29 & n.46, *Hirabayashi*.

organizations and Japan. The government drew this evidence from facts—found in congressional hearings, newspaper reports, and general articles and books—that "embrace the general military, political, economic, and social conditions under which the challenged orders were issued. These historical facts . . . are of the type that are traditionally susceptible of judicial notice in considering constitutional questions. . . ." Brief for the United States at 11, *Hirabayashi* (footnote omitted).<sup>17</sup>

The question of disclosure arose again in 1944 with the preparation of brief for *Korematsu v. United States*. By this time, DeWitt's *Final Report* had been published.<sup>18</sup> Also, by this time, the Attorney General had in his possession the letters from FCC Chairman Fly and FBI Director Hoover contradicting the *Report's* security concerns. See Letter from FCC Chairman Fly to Attorney General Biddle (Apr. 4, 1944) (Complaint, Exhibit E); Memorandum from John L. Burling to Attorney General Biddle (Apr. 12, 1944) (Complaint, Exhibit K). Prompted by these letters, two Justice Department officials working on the *Korematsu* brief—Ennis and Burling—pushed for the Department to disavow the *Final Report*. Memorandum from Ennis to Assistant Attorney General Herbert Wechsler (Sept. 30, 1944) (Complaint, Exhibit L). Burling wrote a footnote, initially included within a draft of the brief, that stated:

The Final Report of General DeWitt (which is dated June 5, 1943, but which was not made public until

<sup>17</sup> The brief did not cite DeWitt's *Final Recommendation* as a source of its facts.

<sup>18</sup> In 1942, an excerpt from the *Final Report* was shown to Ennis, who objected to misstatements of fact within it. Prior to its official publication, copies were made available to the states of California, Oregon, and Washington for use in an *amici curiae* brief in *Hirabayashi*; advance copies were not given to the Justice Department, however. See Memorandum from Ennis to Assistant Attorney General Herbert Wechsler at 3 (Sept. 30, 1944) (Complaint, Exhibit L).



January 1944) is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. The recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signalling by persons of Japanese ancestry, in conflict with information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not ask the Court to take judicial notice of the recital of those facts contained in the Report.

Memorandum of Burling to Assistant Attorney General Wechsler (Sept. 11, 1944) (quoted in *Korematsu v. United States*, No. 27635-W, slip op. at 21 (N.D. Cal. Apr. 18, 1944)). Ennis urged the footnote's preservation against War Department objections on several grounds, including the Justice Department's ethical obligation to the Supreme Court not to cite inaccurate material as a source of which the Court might take judicial notice. Ennis Memorandum at 1.

Instead, after negotiation with the War Department, the Justice Department substituted a different footnote, which was less offensive to the War Department and more ambiguous as to the accuracy of the *Final Report*. The new footnote stated that

The *Final Report* of General DeWitt (which is dated June 5, 1943, but which was not made public until January 1944), hereinafter cited as *Final Report*, is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the *Final Report* only to the extent that it relates to such facts.

Brief for the United States at 11 n.2, *Korematsu*. In place of the *Final Report*, the brief based its military necessity argument on the facts and authorities in the *Hirabayashi* brief. The brief added to these authorities Ringle's anonymous Harper's Magazine article. *Id.* at 12. n.3. The brief did not discuss the article's contents.

With these representations before it, the Court upheld both the curfew in *Hirabayashi* and the evacuation in *Korematsu* as legitimate exercises of the constitutional power to wage war. Findings of military necessity were central to both of these holdings. As the Court stated in *Korematsu*:

Here, as in the *Hirabayashi* case, *supra*, at page 99, "... we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."

323 U.S. at 218.

## II.

Plaintiffs' complaint alleges the foregoing facts and, for relief, asks that the United States be required to pay compensation for various injuries caused to them by the internment. The United States defends by a plea of sovereign immunity and emphasizes that it is subject to suit for monetary damages only in those situations where it has consented to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Plaintiffs cite a number of statutes which they claim act to waive sovereign immunity: the Tucker Act, the Federal Tort Claims Act, the civil rights

statutes, the general federal jurisdiction statute, and the Administrative Procedure Act. These statutes will be considered in that order. Where plaintiffs have established a waiver of sovereign immunity, the United States' other defenses—the running of the statutes of limitation and the exclusivity of the American-Japanese Evacuation Claims Act—will be considered.

#### A.

The Tucker Act grants federal court jurisdiction over “any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of any executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” 28 U.S.C. § 1491.<sup>19</sup> That language has been held to constitute consent by the federal government to suit for monetary damages. *United States v. Mitchell*, 103 S.Ct. 2961, 2967 (1983). It does not, however, create a substantive right to damages. Rather, the substantive right must be found in some other source of law, such as the Constitution, an Act of Congress, or an executive regulation. Not every constitutional provision, statute, or regulation provides a basis for an award of monetary damages against the federal government. To succeed, the plaintiff must show that the source of substantive law “can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.” *Id.* at 2968 (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)); see also *Kizas v. Webster*, 707 F.2d 524, 537 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 709 (1984). Such a source of substantive law need not itself contain a

<sup>19</sup> Section 1491 grants jurisdiction over these cases to the United States Claims Court. The district courts are given concurrent jurisdiction by 28 U.S.C. § 1346(a) (2) for claims not exceeding \$10,000. Plaintiffs seek only \$10,000 for each nontort claim and therefore fall within § 1346(a) (2).

waiver of sovereign immunity; the Tucker Act suffices for that purpose. *Mitchell*, 103 S.Ct. at 2968.

Fourteen of plaintiffs' claims are based on alleged violations by the federal government of plaintiffs' constitutional rights. Plaintiffs contend that they were subjected to loss of life, liberty, and property without probable cause, notice of charges against them, or hearings in violation of their Fifth Amendment due process rights (Count I); that they were subjected to invidious discrimination based on race and national origin in violation of their Fifth Amendment equal protection rights and of the privileges and immunities clause (Counts II, V); that their property was taken without just compensation in violation of the Fifth Amendment takings clause (Count III); that they were subject to arrest and search without probable cause or warrant in violation of the Fourth Amendment (Count IV); that they were denied fair trial and representation by counsel in violation of the Sixth Amendment (Count VI); that they were subjected to cruel and unusual punishment in violation of the Eighth Amendment (Count VII); that they were deprived of their First and Ninth Amendment rights of freedom of speech, petition, assembly, religion, travel, and privacy (Counts VIII-XII); that they were subjected to forced labor without compensation in violation of the Thirteenth Amendment (Count XIII); that they were the subject of bills of attainder and *ex post facto* laws in violation of Article I, section 9 (Count XIV); and that they were denied their right of *habeas corpus* pursuant to Article I, section 9 (Count XV).

Only one of the constitutional provisions on which plaintiffs rely can fairly be interpreted to mandate compensation: the Fifth Amendment “takings” clause. The Fifth Amendment due process clause does not support a monetary claim against the federal government because “[t]he Due Process Clause simply cannot be read to mandate money damages be paid.” *Radin v. United States*, 699 F.2d 681, 685 n.8 (4th Cir. 1983) (quoting *Alabama*



*Hospital Ass'n v. United States*, 656 F.2d 606, 609 (Ct. Cl. 1981)). Nor does the equal protection clause of the Fifth Amendment mandate compensation. *Carruth v. United States*, 627 F.2d 1068, 1081 (Ct. Cl. 1980) (equal protection clause "do[es] not obligate the Federal Government to pay money damages"). The other constitutional provisions are equally inhospitable to plaintiffs' monetary claims.

Plaintiffs urge the Court to follow either of two paths around this jurisdictional roadblock. First, they argue that the government should be equitably estopped from raising a sovereign immunity defense because of its alleged misconduct in misrepresenting and suppressing evidence before the courts and manipulating judicial processes. However, it is well established that subject matter jurisdiction cannot be created by the actions of the parties; in particular, principles of estoppel do not apply. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

Plaintiffs alternatively urge that the rule of liability articulated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), be extended against the federal government. In *Bivens*, the Supreme Court recognized the right of a private plaintiff to seek damages against a federal agent who, while acting under color of his authority, violated the plaintiff's Fourth Amendment rights. See also *Carlson v. Green*, 446 U.S. 14 (1980) (recognizing *Bivens* claim based on Eighth Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (recognizing *Bivens* claim based on Fifth Amendment due process clause). Plaintiffs argue that a *Bivens* action should lie not only against an individual federal employee but also against the United States itself. Plaintiffs point to principles underlying the Court's action in *Bivens*—the historic availability of damages to remedy invasions of personal interests in liberty and the absence of other effective judicial remedies—as support for their position. Cf. Note, Rethinking Sovereign Immunity After

*Bivens*, 57 N.Y.U. L. Rev. 591 (1982). However, *Bivens* also cautions that a court should refrain from creating a cause of action where "special factors counsel[] hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 196. Congress' interest in maintaining control over the public fisc is such a special factor. Thus, there being no affirmative action by Congress in this context, the doctrine of sovereign immunity stands as a bar to the holding that plaintiffs seek. See *Duarte v. United States*, 532 F.2d 850, 852 (2d Cir. 1976) (refusing to recognize *Bivens* action against United States).

Only the takings claim remains of the plaintiffs' causes of action based on the Constitution. The takings clause forbids that "private property be taken for public use, without just compensation." U.S. Const. amend V. That guarantee is designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Plaintiffs' claim is in essence an inverse condemnation proceeding, in which a citizen is deprived of property by the government and then must initiate judicial action to obtain just compensation. This Court has jurisdiction over such suits under the Tucker Act. *United States v. Dow*, 357 U.S. 17, 21 (1958); *United States v. Dickinson*, 331 U.S. 745, 747-48 (1947).

Plaintiffs' alleged property losses fall into three categories. The first category includes property confiscated by federal authorities: cameras, radios, vehicles, bank deposit assets, crops, and business property. The second category encompasses property lost as a result of the government's exclusion of plaintiffs from homes and businesses on the West Coast. The third consists of "vested constitutional rights" lost as a result of the evacuation and internment. Plaintiffs' Opposition to Motion to Dismiss at 14-16 (July 15, 1983).

The claim that the government "took" constitutional rights can be quickly dismissed. The Supreme Court has



defined property for taking purposes as "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corps.*, 323 U.S. 373, 378 (1945). Contract rights are also a form of property that may be taken. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977). The various constitutional rights asserted by plaintiffs, however, do not fall within any category of "property" recognized for takings purposes. The cases cited by plaintiffs, *Arnett v. Kennedy*, 416 U.S. 134 (1974), and *Board of Regents v. Roth*, 408 U.S. 564 (1972), define property rights for the purpose of due process but have no applicability to takings doctrine. See *Kizas v. Webster*, 707 F.2d 524, 539 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 709 (1984).

Plaintiffs' other claims fit within the takings clause's definition of property. There is no "set formula," however, for determining whether their property was "taken." Rather, a court must engage in "essentially ad hoc, factual inquiries," and its ruling will depend largely "upon the particular circumstances [in that] case." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). A number of factors guide this determination. One is the character of the governmental action; a taking may more readily be found when there is an actual physical invasion of the property than when the interference took the form of a public program. Still, physical invasion is not essential; a statute that substantially furthers important public policies may still so frustrate distinct investment-backed expectations [*sic*] as to amount to a taking. See *id.* at 123-28 (reviewing taking cases); *Foster v. United States*, 607 F.2d 943 (Ct. Cl. 1979) (taking occurred when owners of reserved mineral interest in land they gave to government were denied access to property for mining purposes.)

Defendant suggests that there is no takings claim here because the government's actions were based on a perceived need to protect the national security. During times

of imminent peril, the government is empowered to destroy an individual's property without compensation where that action might result in saving the lives and property of many. See *United States v. Caltex*, 344 U.S. 149 (1952); *United States v. Pacific Railroad Co.*, 120 U.S. 227 (1887). Common examples of this authority would be the demolition of neighboring structures to fight a city fire, or, of more relevance to this case, the destruction of bridges or refineries to impede the advance of enemy forces. The sovereign is not free to take any property without compensation that may be needed for the war effort; the element of imminent peril is required.<sup>20</sup>

The issues posed by plaintiffs' taking claim therefore, are whether a taking occurred and whether the taking, if any, was the product of action necessitated by immediate peril. Plaintiffs, of course, allege that there was no military necessity for the evacuation and internment and that those in charge were aware of that fact. Considering plaintiffs' allegations of fact in the most favorable light, as required with a motion to dismiss, the Court must conclude that plaintiffs have stated a takings claim.

## B.

Yet that conclusion does not end the inquiry. The government contends that this Court does not have jurisdiction to hear the takings claim, or, in fact, any of plaintiffs' claims, because Congress intended that the reimbursement mechanism created by the American-Japanese Evacuation Claims Act, 50 U.S.C. App. § 1981-1987,

<sup>20</sup> The cases cited by defendant to support its "national security" argument are inapposite here. Both *National Board of Young Men's Christian Associations v. United States*, 395 U.S. 85 (1969), and *Monarch Insurance Co. v. District of Columbia*, 353 F. Supp. 1249 (D.D.C. 1973), *aff'd*, 497 F.2d 683 (D.C. Cir.), *cert. denied*, 419 U.S. 1021 (1974), concern takings claims based on destruction that occurred in efforts to protect the property at issue.

should be the exclusive remedy for monetary claims of those affected by the evacuation program.<sup>21</sup>

The Act was passed in 1948 for the purpose of adjudicating "claims of persons of Japanese ancestry against the United States for losses arising out of their forced evacuation from the west coast, Alaska, and Hawaii during World War II." H.R. Rep. No. 732, 80th Cong., 2d Sess., reprinted in 1948 *U.S. Code Cong. & Ad. News* 2297, 2297. Under the statute, which was amended in 1951 and 1956, the Attorney General was empowered to settle claims for up to \$100,000 for damage to or loss of real or personal property that was a "reasonable and natural consequence" of the evacuation. 50 U.S.C. App. §§ 1981(a), 1984(a). If a compromise could not be reached, the Court of Claims had jurisdiction to determine the claim. *Id.* § 1984(b). Not compensable under the Act were losses resulting from death or personal injury, personal inconvenience, physical hardship, or mental suffering; loss of anticipated profits or earnings; loss of property vested in the United States pursuant to the Trading With the Enemy Act; and losses arising from certain statutory actions of government agencies. The Act also excluded claims by individuals deported to Japan or who were not actually residing in the United States on December 7, 1941. *Id.* § 1982(b). The Act set a deadline of January 3, 1950, for the presentation of claims. *Id.* § 1982(a). The payment of an award under the Act was "final and conclusive for all purposes, notwithstanding any other provision of law to the contrary" and was a "full discharge of the United States . . . with respect to all claims arising out of the same subject matter." *Id.* § 1984(d). Over 26,000 claims were filed; approximately \$37 million was distributed by the government. *Personal Justice Denied* at 118.

<sup>21</sup> Plaintiffs cite the Evacuation Claims Act as a jurisdictional basis for their suit. Complaint ¶ 8. All claims under the Act were required to be filed by January 3, 1950. 50 U.S.C. App. § 1982(a). Plaintiffs' claims, therefore, would fall outside the terms of the Act.

Defendant argues that the Act is a comprehensive system which Congress designed with claims similar to plaintiffs' in mind. Therefore, defendant asserts, the Court does not have subject matter jurisdiction over plaintiffs' claims; Congress placed that jurisdiction solely in the hands of the Attorney General and the Court of Claims.

Defendant reads too much into the Act. The intent of Congress, as expressed by the language of the statute, was to compensate "for damage to or loss of real and personal property," *id.* § 1981; the statute carefully excludes claims that are not directly related thereto. It may be true, as defendant states, that the Attorney General and the Court of Claims took a broad approach to defining compensable claims. But that is not evidence of Congress' intent. The Act does not bar this Court from jurisdiction over all of plaintiffs' claims.

Whether the Act was intended to be the sole remedy for claims of property loss is a more difficult question. Here, the Supreme Court's teachings in *Brown v. General Services Administration*, 425 U.S. 820 (1976), are instructive. The question in *Brown* was whether Congress intended Title VII of the Civil Rights Act of 1964 to be the exclusive remedy for a federal employee complaining of job-related discrimination. Congress failed to state the answer explicitly, so the Court looked to other evidence of Congress' intent. First, it noted that at the time Congress extended Title VII to federal workers, Congress believed, rightly or wrongly, that federal employees had no other remedy to fight employment discrimination. The Court found in that perception an indication of intent to create an exclusive remedy. In addition, the Court found that the "structure" of the Act was indicative of exclusivity: "the balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief." *Id.* at 832. It has often been held that a



precisely drawn, detailed statute preempts more general remedies.

Here, there is a detailed statute, finely tuned by amendment, and enacted by a Congress that may have believed that no other remedy was available to those who had been evacuated. See H.R. Rep. No. 732, 80th Cong., 2d Sess., reprinted in 1948 U.S. Code Cong. & Ad. News, 2297, 2299. ("The only clear recourse which the evacuees now have, through the passage of private relief bills, is totally impracticable.") (Letter from Interior Secretary J.A. Krug to House Speaker Joseph W. Martin, Jr.) Yet the system Congress created, while detailed, is not complete; it does not reimburse individuals for all property claims for which they might recover under the takings clause. For example, there has been no showing here that claimants were paid for the value of the use of property denied to them during the period of their internment. But such lost value is recoverable when a "temporary" taking occurs. Compare 50 U.S.C. App. § 1981 with *Kimball Laundry Co. v. United States*, 338 U.S. 17 (1949). Nor were claimants paid for interest that accrued between the time of their loss and the time of payment. Yet interest is also recoverable under the takings clause. Compare *Claim of George M. Kawaguchi*, 1 *Adjudications of the Attorney General* 14, 19-20 (1956), with *Seaboard Air Line Railway Co. v. United States*, 261 U.S. 299, 306 (1923). To bar constitutional claims from the courts is an extraordinary step which courts are not willing to take absent a clear and convincing expression of congressional intent. See *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974).

The question of exclusivity need not be reached here, however, because another defense raised by the government—the running of the statute of limitations—requires dismissal of the takings claim. The lifespan of plaintiffs' takings claim is controlled by 28 U.S.C. § 2401(a), which states that, except where specifically provided elsewhere,

every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

The Court has no jurisdiction to consider claims that fall outside the six-year period. *Japanese War Notes Claimants Association of the Philippines, Inc. v. United States*, 373 F.2d 356, 358 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967); see also *Garrett v. United States*, 640 F.2d 24, 26 (6th Cir. 1981).

The length of a statute of limitations is a product of a legislative weighing of competing claims of fairness—the need of plaintiffs for a reasonable amount of time within which to present their claims, and the right of defendants to be free of stale claims. Statutes of limitation also protect both the Court and the defendant from cases where the loss of evidence—by death or disappearance of witnesses, fading memories, or disappearance of documents—may frustrate the search for truth. *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

This suit was filed on March 16, 1983. A right of action normally accrues at the time the underlying incident occurred, and that in essence is the rule defendant wants applied here. The alleged taking of property occurred during World War II; under defendant's theory, the six-year period would have begun to run then and would have expired well before this suit was filed.

Plaintiffs assert, however, that defendant fraudulently concealed information essential to their cause of action. They claim that this information was not revealed until the publication in December 1982 of *Personal Justice Denied*, the report of the Commission on Wartime Relocation and Internment of Civilians. Plaintiffs argue that the running of the statute was tolled until that date, so that their suit would fall well within the six-year period.<sup>22</sup>

<sup>22</sup> In addition, plaintiffs argue that the United States is equitably estopped from raising a statute of limitations defense because of



Plaintiff's argument relies heavily on this Circuit's decision in *Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981). The plaintiff Richards was a career employee with the United States Information Agency who resigned under duress in 1955. He brought suit 24 years later, complaining that defendants, six former federal officials, had knowingly and maliciously used false information to obtain his resignation. Defendants did not tell plaintiff in 1955 that they had concocted the charges that led to his resignation; plaintiff did not discover that fact until 1978, when a request under the Freedom of Information Act produced documents revealing defendants' culpability. Defendants' motion to dismiss on statute of limitations grounds was granted. The Court of Appeals reversed, holding that where a defendant conceals facts giving rise to the plaintiff's claim—here that defendants had made false accusations against plaintiff—the statute is tolled until the plaintiff, employing due diligence, could have discovered the facts that were fraudulently concealed. *Id.* at 69-70.<sup>23</sup>

Plaintiffs do not argue that they were unaware during the war that they had lost their property or that the loss resulted from the government's program of evacuation and internment. Rather, they claim that had they brought suit when the property was lost, the suit would

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its fraudulent concealment. The statute of limitations is a condition that Congress has placed on the United States' consent to suit. As such, it is a jurisdictional requirement that cannot be waived or subject to estoppel. *Garrett v. United States*, 640 F.2d 24, 26 (6th Cir. 1981); see also *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (subject matter jurisdiction cannot be established by estoppel).

<sup>23</sup> Where there are continuing acts of concealment, plaintiffs urge adoption of a rule that accrual occurs, not when plaintiffs should have discovered their cause of action but, when they actually discovered it. See *Tomera v. Galt*, 511 F.2d 504, 510 (7th Cir. 1975). Due diligence, not actual discovery, is the law of this Circuit, however.

have foundered upon the government's defense that evacuation and internment were required by military necessity. Indeed, plaintiffs argue that the Supreme Court's "finding" of military necessity in *Korematsu* practically precluded any future challenge to the government's actions. The issue, therefore, under plaintiffs' theory of the case, is this: at what time were sufficient facts generally known about the evacuation and internment so that plaintiffs, using due diligence, could have conscientiously challenged the military necessity finding.<sup>24</sup> Plaintiffs maintain that sufficient information was not available until 1982 when the Commission pulled together the facts which allegedly impeach that finding.

The government urges adoption of a theory of accrual much narrower than the holding in *Richards*. It claims that *Richards* involved individual defendants, and that its fraudulent concealment holding does not necessarily apply to the United States. Instead, defendant argues, the most liberal tolling doctrine applicable to the United States is that set out in *United States v. Kubrick*, 444 U.S. 111 (1979). In *Kubrick*, a medical malpractice suit brought under the Federal Tort Claims Act, the Supreme Court held that the Act's two-year statute of limitations begins to run once a plaintiff is aware of his injury and its cause. Awareness of his legal rights is not necessary. Defendant argues that the plaintiffs here

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<sup>24</sup> It is helpful to view plaintiffs' argument in light of the recently revised Rule 11 of the Federal Rules of Civil Procedure. That rule states in part:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

knew of their injury—the property loss—and its cause when the injury occurred. Their cause of action therefore accrued then. Defendant contends that even if *Richards* should apply, there was no concealment of plaintiffs' "cause of action"; the concealment, if any, went to an affirmative defense and not to the takings claim.

Defendant is correct in stating that *Richards* involved individual defendants and not the federal government. But the doctrine of fraudulent [*sic*] concealment has been applied to the United States by other courts, and nothing in *Kubrick* establishes that those holdings are wrong. See *Diminnie v. United States*, No. 81-1713, slip op. at 6 (6th Cir. Feb. 20, 1984); *Japanese War Notes Claimants Association of the Philippines, Inc. v. United States*, 373 F.2d 356, 358-59 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967). Defendant is also correct in stating that the concealed facts in *Richards* went to an element of plaintiff's cause of action, while here, the concealed facts go to a defense. Yet it would not be appropriate to hinge the decision here on such a technical distinction.

It is undisputed that reports from the FCC, the FBI, and Naval Intelligence contradicting the claim of military necessity were concealed by defendant throughout the war, as most graphically illustrated by the Ennis and Burling memoranda urging the disclosure of these findings in the *Hirabayashi* and *Korematsu* briefs. Obviously, Ennis and Burling strongly believed that these documents could have affected the Supreme Court's decisions. Had this information been suppressed until the present, plaintiffs' tolling argument might succeed under *Richards*.

But, even if *Richards* is applied in this case, plaintiffs' claim is time barred. The FCC, FBI, and Naval Intelligence reports and others have been available, and publicized, since soon after the war's conclusion. The pre-war report from Curtis Munson to President Roosevelt, which advised, "There is no Japanese 'problem' on the

Coast" was first disclosed in 1946 during hearings of the Joint Congressional Committee on the Investigation of the Pearl Harbor Attack. *Pearl Harbor Attack: Hearings Before the Joint Committee on the Investigation of the Pearl Harbor Attack*, 79th Cong., 1st Sess. 2680 (1946). Ringle's detailed report, which concluded that only limited individual detention of Japanese Americans was needed, was published at least as early as 1949 in Martin Grodzins' book, *Americans Betrayed: Politics and the Japanese Evacuation* 188-89.<sup>25</sup> Grodzin's [*sic*] book also reported the letter from FCC Chairman Fly to Attorney General Biddle describing Fly's surveillance reports to General DeWitt and revealing the inaccuracies of DeWitt's claims of illicit transmissions. *Id.* at 291-94. That book notes that FBI Director Hoover similarly denied the existence of unauthorized transmissions in a letter to Biddle. *Id.* at 291. Finally, Grodzin [*sic*] points out that all of this information was gathered by the Justice Department in preparation for the Supreme Court litigation. *Id.* at 291 n.50.

Grodzins' [*sic*] book is not alone; the events surrounding the evacuation and internment have been subjected to intense scrutiny over the years and have produced a lengthy literature.<sup>26</sup> These publications lay out almost all

<sup>25</sup> As noted above, an abbreviated version of Ringle's report appeared in the October 1942 issue of *Harper's Magazine*. The article did not carry Ringle's name; the author was listed as an "Intelligence Officer" stationed on the West Coast who had studied that area's Japanese population. Reference was made to the article in the government's *Korematsu* brief; the brief did not describe the article's conclusions or elaborate on the authority's identity or expertise.

<sup>26</sup> An incomplete list of material, not including congressional hearings and archival material, published at least six years before this suit was filed would include *The Japanese in America, The Problem and Solution*, *Harper's Magazine*, Oct. 1942, at 489; U.S. Dept. of Interior, *The Evacuated People: A Quantitative Description* (1946); M. Grodzins, *Americans Betrayed* (1949); J. tenBroek, E. Barnhart & F. Matson, *Prejudice, War and the Constitution*



of the facts alleged by plaintiffs, along with many others. Plaintiffs cannot claim that the facts underlying their suit were discovered by the Commission on Wartime Relocation and Internment of Civilians. Its synthesis of the material has made it easier for plaintiffs to challenge the military necessity rationale of *Korematsu*. But the availability of the material to a diligent plaintiff did not require the Commission's intervention. A Supreme Court finding is a formidable obstacle. But diligent advocates have successfully challenged such decisions in the past. Compare *Brown v. Board of Education*, 347 U.S. 483 (1954), with *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), with *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), with *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Here, such a suit could have been filed long ago.

Still, plaintiffs point to several documents that were not released until the Commission's report was published in 1982 and that they claim are "essential" to the success of their challenge.

Two of these documents date from before the war: a memorandum from President Roosevelt to the Chief of Naval Operations, dated August 10, 1936 (Complaint, Exhibit B), and a memorandum from Secretary of the Navy Frank Knox to President Roosevelt, dated October 9, 1940 (Complaint, Exhibit A). These documents discuss the possibility of building "concentration camps" for Japanese Americans "in the event of trouble." Plain-

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(1954); A. Bosworth, *America's Concentration Camps* (1967); R. Daniels, *Concentration Camps USA: Japanese Americans and World War II* (1971); R. Daniels, *The Decision to Relocate the Japanese Americans* (1975); M. Weglyn, *Years of Infamy: The Untold Story of America's Concentration Camps* (1976). The most recent works are Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (1982), and P. Irons, *Justice at War* (1983).

tiffs cite these as evidence that the conspiracy to deprive them of their constitutional rights began before the war. However, plaintiffs' suit is based not on the fact of internment but rather on internment without military necessity. These documents shed no new light on that, unless they corroborate military concerns contemporary to the internment decision.

Next, plaintiffs point to a letter from Colonel Karl Bendetsen, liaison between the War Department and the Western Defense Command, to Lieutenant John Hall, Acting Executive Officer in the Assistant Secretary of War's office. (Complaint, Exhibit M). The letter, dated September 13, 1942, submits to Hall a draft of legislation designed to suspend the writ of habeas corpus as to persons of Japanese ancestry who had been excluded from any military area. Plaintiffs view this as further evidence of the conspiracy to deprive them of their rights and property. But while his goal may not have been admirable, Colonel Bendetsen's suggestion of the submission of this or any other bill for Congress' consideration is not actionable or evidence of anything relevant to plaintiffs' ability to make a timely claim.

The most significant of the newly released documents are the memoranda by Edward Ennis and John Burling discussing the inaccuracies in DeWitt's *Final Report* and urging that notice be taken of those inaccuracies in the *Hirabayashi* and *Korematsu* briefs. These memoranda show that some Justice Department officials believed that DeWitt's military necessity rationale was questionable but that their superiors decided nevertheless not to disclose to the Supreme Court probative evidence contradicting that rationale. Plaintiffs argue that these documents are essential to their claim because the

documents previously available did *not* disclose the government's conspiracy or other evidence obviously different from that which had been presented to the courts in the 1940's. To the contrary, this published



information merely tended to support the *same arguments* advanced against the government and rejected in the wartime cases—that the plaintiff class was loyal to the United States and there was no military necessity for the wartime actions. It was not until the [Commission's] work and related archival findings uncovered and published evidence of *intentional government concealment and misrepresentation*, that plaintiffs had evidence *obviously different* from that earlier ruled on by the Supreme Court. . . . The [Commission] report and related archival findings repudiate the government's wartime representations in its legal briefs and the foundations of the Supreme Court's wartime rulings. These documents finally provided plaintiffs the grounds for a good faith pleading that could successfully rebut the government's claims of "military necessity," and thus meet the requirements of Rule 11, Fed. R. Civ. P., and *stare decisis*.

Plaintiffs' Supplemental Memorandum on the Statute of Limitations at 7-9 (Jan. 20, 1984) (footnote omitted).

However, it is the Ringle, Fly, and Hoover documents, not the Ennis and Burling memoranda, which contain the direct evidence requisite to challenging the finding of military necessity.<sup>27</sup> The Ennis and Burling memoranda are not probative of military necessity, *vel non*. They fully justify the condemnation of the wartime Department of Justice voiced by the Commission and the plaintiffs. The failure of the Attorney General or the Solicitor General of the time to be more forthright with the Supreme Court was one basis for the decision of the District Court in the

<sup>27</sup> The briefs filed in *Korematsu* by appellant, the Japanese American Citizens League, and the American Civil Liberties Union all strongly attacked the finding of military necessity made by the Executive Branch. Those briefs, however, relied for factual assertions essentially upon newspaper reports and similar secondary sources.

Northern District of California to vacate the conviction of Fred Korematsu. *See Korematsu v. United States*, No. 27635-W (N.D. Cal. Apr. 18, 1984).<sup>28</sup> But for purposes of the takings claim at issue here, the memoranda are directly probative only of the fact that the Department of Justice denied the Supreme Court timely access to the Ringle, Fly, and Hoover documents.<sup>29</sup> That concealment, whether intentional or not, is not a basis for tolling a statute of limitations beyond the time the information concealed by that conduct was published. The publication in the late 1940's of the previously concealed Ringle, Fly, and Hoover documents, not the publication in the 1980's of the Ennis and Burling memoranda, provided the basis on which plaintiffs could have filed a complaint

<sup>28</sup> Fred Korematsu recently brought a petition for a writ of error *coram nobis* in the United States District Court for the Northern District of California to vacate his wartime conviction on the ground of governmental misconduct. The Court has granted that petition. *Korematsu v. United States*, No. 27635-W (N.D. Cal. Nov. 14, 1983). In reaching its decision, the Court held, *inter alia*, that the petition had been timely filed.

It appears from the record that much of the evidence upon which petitioner bases his motion was not discovered until recently. In fact, until the discovery of the documents relating to the government's brief before the Supreme Court, there was no specific evidence of governmental misconduct available.

*Id.* slip op. at 25 (Apr. 18, 1984).

That holding does not affect the conclusions of this Court. The government did not oppose Korematsu's *coram nobis* petition, so that the issue of timeliness was not sharply defined there. In contrast, this case involves the government's sovereign immunity, and thus requires a searching investigation of timeliness. Furthermore, while the "specific evidence" of governmental misconduct has only recently been revealed, circumstantial evidence has long been available. Finally, evidence of the government's misconduct was not requisite to the filing of plaintiffs' claims here; other evidence rebutting the government's claim of military necessity was available.

<sup>29</sup> It is unclear whether the Department of Justice had the Munson report at the time it filed its briefs in *Korematsu*.

challenging the military necessity finding and marked the beginning of the running of the statute of limitations.

This conclusion does not overlook plaintiffs' contention that the 1982 publication of the Ennis/Burling memorandum was the first disclosure of direct evidence of a vital overt act in an alleged conspiracy: "intentional government concealment" of the Ringle, Fly, and Hoover documents from the Supreme Court by the Department of Justice at the behest of the military. See Plaintiffs' Supplemental Memorandum at 8. But there has long been sufficient circumstantial evidence of the concealment: the Department of Justice had these documents when it filed its brief in *Korematsu*, yet it is apparent from the face of the United States' brief that it did not mention those documents. See *supra* pp. 40-41. Moreover, proof of intentional concealment or of conspiracy cannot overcome the ultimate fact for limitations tolling purposes that the underlying documents concealed from the Supreme Court in 1944 became public and were available to diligent plaintiffs from the late 1940's onward. The statute of limitations has run long ago.

In summary, the standard by which fraudulent concealment must be judged is not one of full disclosure but rather one of sufficient disclosure to allow the plaintiffs, through due diligence, to state a claim. In other words,

Once the statute of limitations has been tolled, it is not necessary that plaintiff obtain a thorough understanding of all the facts to halt the suspension. Defendant is not required to wait until plaintiff has started substantiating its claims by the discovery of evidence. Once plaintiff is on inquiry that it has a potential claim, the statute can start to run.

*Japanese War Notes Claimants Association of the Philippines, Inc. v. United States*, 373 F.2d 356, 359 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967). By this standard, plaintiffs could have brought their claim even without the benefit of these new documents.

In an attempt to reduce their burden, plaintiffs advance several arguments concerning the requirement of due diligence, each of which can be quickly met. They argue that "aggravating factors," such as "governmental secrecy, misrepresentations, exclusive control of evidence pertaining to military necessity, unidentified informants, and intentional efforts to conceal evidence," should be weighed in judging due diligence. Plaintiffs' Supplemental Memorandum on the Statute of Limitations at 15 (Jan. 20, 1984). But the due diligence standard was developed in the context of fraudulent concealment; to consider these "aggravating factors" would be the equivalent of double counting. Secondly, plaintiffs urge that the degree of difficulty in gathering the necessary documents—which they say were spread out over more than eighteen archival libraries in seven different states—should be considered in tolling the statute. The crucial time period in this regard, however, is not the time needed to assemble every relevant document, but the time needed to assemble information sufficient to file a complaint. As has been set out more fully above, all of the necessary facts have long been in the public domain, available to a diligent plaintiff and counsel.<sup>30</sup> Finally, plaintiffs argue that the due diligence requirement is lessened here because a fiduciary relationship existed between defendant and plaintiffs, putting an additional burden of disclosure on defendant. No such relationship can be established, however, as will be discussed below.

#### D.

In addition to their constitutional claims, plaintiffs seek recovery under the Tucker Act on several contract theories (Count XXI).<sup>31</sup> They assert that express contracts,

<sup>30</sup> The books cited *supra* note 26 are replete with relevant research.

<sup>31</sup> The Tucker Act gives the Court of Claims "jurisdiction to render judgment upon any claim against the United States founded



both oral and written, arose from promises by General DeWitt and other United States officials concerning the nature, purpose, and duration of the detention and the services and protections to be accorded plaintiffs. For example, Civilian Exclusion Order No. 5 (Complaint, Exhibit I) stated that the government would

Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property including: real estate, business and professional equipment, buildings, household goods, boats, automobiles, livestock, etc.

Plaintiffs also allege the existence of implied in fact contracts based on defendant's "actions and directives assuming complete custody and care for plaintiffs and their property. . . . Plaintiffs correspondingly complied with government requests to abandon their homes, businesses, and properties, and sacrifice their freedoms." Plaintiffs' Opposition to Motion to Dismiss at 26 (July 15, 1983). Finally, plaintiffs allege express and implied contracts of bailment between plaintiffs and defendant for property seized by defendant or surrendered to its custody during the war, most of which has not been returned or accounted for.

In evaluating plaintiffs' claims, it must be kept in mind that the Tucker Act's waiver of sovereign immunity is limited to express contracts and contracts implied in fact; it does not extend to contracts implied in law or founded upon equitable principles. *Kizas v. Webster*, 707 F.2d 524 (D.C. Cir. 1983) *cert. denied*, 104 S. Ct. 709 (1984); *Knight Newspapers, Inc. v. United States*, 395 F.2d 353, 357 (6th Cir. 1968). In addition, contracts with the United States based on oral promises by a federal official are not valid absent proof that the official had the actual

... upon any express or implied contract with the United States. . . ." 28 U.S.C. § 1491. The district courts have concurrent jurisdiction for contract claims not exceeding \$10,000. 28 U.S.C. § 1346(a)(2).

authority to make them. "One who purports to contract with the United States assumes the risk that the official with whom he deals is clothed with the actual authority to enter the contract alleged." *Jackson v. United States*, 573 F.2d 1189, 1197 (Ct. Cl. 1978).

It is questionable whether the evacuation, which was authorized by military and executive order rather than mutual agreement, gave rise to any express or implied contracts. Yet even assuming that plaintiffs' contract claims are valid, those claims would be barred by the six-year statute of limitations that applies to contract claims under the Tucker Act. 28 U.S.C. § 2401(a). Plaintiffs allege that the government promised to protect their persons and property. Failure to do so would have been evident both during and after the war. The statute would have begun to run at that time.

The statute of limitations would also bar plaintiffs' bailment claims, assuming those claims to be valid. Plaintiffs have not alleged when the government was expected to return the bailed goods. It would seem reasonable to conclude, however, that both parties expected demand for delivery to be made upon plaintiffs' release from internment. Yet even if there was no specified time of demand, plaintiffs cannot wait almost forty years to demand delivery. Where no time for demand is specified by contract, demand must be made within a reasonable time after the bailor is entitled to the return of the property. 8 C.J.S. *Bailment* § 45, at 497 (1962). That period would have expired soon after the war.

#### E.

Plaintiffs' final count under the Tucker Act alleges that defendant, through the evacuation and internment program, established a system of comprehensive and pervasive federal control over every aspect of plaintiffs' daily lives (Count XXII). According to plaintiffs, this system gave rise to a fiduciary relationship, with the United



States as trustee and plaintiffs as wards or beneficiaries. The United States is alleged to have breached its fiduciary duties by failing to protect plaintiffs' property and civil liberties. Plaintiffs claim that the United States is liable for money damages for this breach.

Plaintiffs draw their fiduciary responsibility claim from the Supreme Court decision in *United States v. Mitchell*, 103 S.Ct. 2961 (1983). In that case, the Court found that a fiduciary relationship existed between the United States and certain Indian tribes with respect to management of Indian resources and land. The existence of the fiduciary relationship was held to give the Indians the right to seek money damages from the United States. The Court based its findings of a fiduciary relationship in part on the "elaborate" and "pervasive" control that the federal government exercised over Indian property through various statutes and regulations. 103 S. Ct. at 2972 & n.29. The Court also pointed to precatory statutory and regulatory language directing the government to consider "the needs and best interests of the Indian owner and his heirs" and to dispose of proceeds from timber sales to the "benefit" of the Indian owners. The Court was also influenced by the "undisputed existence of a general trust relationship between the United States and the Indian people." *Id.* at 2972.

Plaintiffs analogize the "pervasive" control over their lives in the internment camps to that found in the *Mitchell* opinion and urge that a similar fiduciary relationship exists here. However, the comparison does not withstand close scrutiny. No act of Congress evidences an intent to create a fiduciary relationship between plaintiffs and defendant. No general trust relationship exists between plaintiffs and defendant. In fact, nothing here is analogous to the historic relationship between the United States and the American Indians, created by treaty, judicial doctrine, and elaborate legislation. See *Cohen's Handbook of Federal Indian Law* 220-28 (R. Strickland ed. 1982).

## F.

In addition to basing jurisdiction on the Tucker Act, plaintiffs assert jurisdiction for almost all of their claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2401(b), 2671-2680. The FTCA allows individuals who are injured by federal government officials and employees in the course of their official duties to seek money damages from the United States. That waiver, however, is subject to numerous conditions. One condition placed on the waiver is that the district court shall not have jurisdiction unless the claim has first been presented and denied by the appropriate federal agency. 28 U.S.C. § 2675(a). Plaintiffs have filed no administrative claims here. They argue, however, that a variety of equitable and practical reasons dictate that they should not be required to exhaust their administrative remedies. Plaintiffs contend, for example, that filing would be impractical, given the size of the plaintiff class, and unnecessary, since the government already has full notice of plaintiffs' claims and an independent agency—the Commission—has recently investigated the incidents underlying the suit. They also claim an equitable exemption from filing where the government has concealed information pertinent to their claims. The line of cases plaintiffs cite to support an equitable exemption, however, applies only where the injured party did not know or have reason to know of the government's involvement in the tort. That is not the case here. More generally, the Court is bound to respect conditions placed by Congress on a waiver of sovereign immunity, particularly when those conditions are expressed in clear and forceful language. The filing requirement applies to all claims, including class actions. See *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 757 (E.D.N.Y. 1980)<sup>32</sup>

<sup>32</sup> Plaintiffs request in the alternative that this suit be stayed to allow them to exhaust their administrative remedies. Since the Court does not have jurisdiction of the FTCA claims, it cannot grant plaintiffs' request.

Even if plaintiffs had exhausted their administrative remedies, their claims would be barred by the FTCA's two-year statute of limitations, 28 U.S.C. § 2401(b). Plaintiffs' FTCA claims can be classified into four groups: negligence, intentional law enforcement torts, constitutional violations sounding in tort, and civil rights claims. The FTCA waives sovereign immunity for claims accruing on and after January 1, 1945, a date which falls toward the end of the sequence of events underlying this suit. It will be assumed, without deciding, that all of plaintiffs' claims fall within the time period since the FTCA became effective.

Plaintiffs' negligence claim alleges that defendant failed to exercise reasonable care in its capacity as custodian of plaintiffs' person and property (Count XX). Because of defendant's negligence, plaintiffs allege, their property was lost or destroyed and they were poorly housed, fed, and cared for.<sup>33</sup> Any damage to plaintiffs' person or property caused by defendant's lack of due care would have been evident to plaintiffs at the time the injury occurred. If such a claim had been filed, and military necessity had been raised as a defense, plaintiffs have long had access to sufficient information to attempt to rebut that defense. These claims therefore would be time barred.

Plaintiffs state three counts that can be classified as intentional law enforcement torts. Count XVII alleges assault and battery, in that defendant's actions subjected plaintiffs to "numerous physical and psychological injuries, fear of imminent bodily harm, and death." Count XVIII alleges false arrest and false imprisonment, in that the exclusion and internment was without legal authority or colorable legal claim. Count XIX alleges abuse of process and malicious prosecution.

<sup>33</sup> Plaintiffs also allege that defendant negligently failed "to pursue means within its control for confirming plaintiffs' loyalty and securing plaintiffs' prompt release." Complaint, ¶ 132. It seems doubtful that defendant had a responsibility under tort law to secure plaintiffs' prompt release from internment. Even so, that claim would also be time barred.

Until 1974, the FTCA excluded claims arising out of intentional torts, including assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process, from its waiver of sovereign immunity. In that year, Congress amended the FTCA to include these intentional torts when committed by federal "investigative or law enforcement officers." 28 U.S.C. § 2680(h). For plaintiffs' claims to succeed, therefore, they must "arise" after the 1974 amendment and have been committed by investigative or law enforcement officers as defined in the statute.

Plaintiffs assert that defendant's concealment of information prevented these claims from accruing until after 1974. But the facts that compel the conclusion that plaintiffs' other claims are time barred produce the same conclusion here. These causes of action are based on the premise that there was no military necessity for the exclusion, that officials in the military and government knew this to be so, but that they used military necessity as a pretext to achieve other goals. Plaintiffs could through due diligence have gathered sufficient information to assert these claims well before 1974.

Plaintiffs also allege that defendant conspired with its own officers and with state and local officials to deprive plaintiffs of their civil rights in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 (Count XVI). The civil rights statutes create causes of action only against individuals and municipalities and do not themselves contain a waiver of sovereign immunity.<sup>34</sup> Plaintiffs contend, however, that civil rights claims, as well as tort claims based

<sup>34</sup> *United States v. Timmons*, 672 F.2d 1373, 1380 (11th Cir. 1982) (§§ 1981, 1982 do not waive sovereign immunity); *Unimex, Inc. v. Department of Housing and Urban Development*, 594 F.2d 1060, 1061 (5th Cir. 1979) (all sections); *Monarch Insurance Co. v. District of Columbia*, 353 F. Supp. 1249, 1252 (D.D.C. 1973), *aff'd*, 497 F.2d 684 (D.C. Cir.), *cert. denied*, 419 U.S. 1021 (1974) (§ 1983); *Community Brotherhood of Lynn, Inc. v. Lynn Redevelopment Authority*, 523 F. Supp. 779, 782-83 (D. Mass. 1981) (§ 1986); *Hill v. McMartin*, 432 F. Supp. 99, 101 (E.D. Mich. 1977) (§§ 1983, 1985, 1986).



on the constitution, can be brought within the FTCA's waiver of immunity. A recent opinion of this Circuit, however, brings this argument into question.<sup>35</sup> Yet even if plaintiffs were correct, their claims would be time barred for the reasons stated above.

### G.

Plaintiffs allege several other jurisdictional bases, none of which are applicable here. The general federal question jurisdiction statute, 28 U.S.C. § 1331, does not waive sovereign immunity in actions essentially seeking money judgments from the United States. *Larsen v. Hoffman*, 444 F. Supp. 245, 255 (D.D.C. 1977). The Administrative Procedure Act (APA), 5 U.S.C. § 702, effects a limited waiver of sovereign immunity in actions for specific relief such as injunctions or declaratory judgments. But plaintiffs can seek no such relief here. Also, the APA does not confer authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief sought. *Larsen*, 444 F. Supp. at 255. For both reasons, the APA is inapplicable here. Finally, there is no justiciable controversy here that would be appropriate for a declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. The All Writs Act, 28 U.S.C. § 1651, empowers the courts to issue writs necessary or appropriate "in aid of their respective jurisdictions" but does not provide jurisdiction in and of itself.

<sup>35</sup> This Circuit has stated that

Because the FTCA's general waiver of immunity extends only to acts or omissions that would be tortious under state law, there is a question whether constitutional torts that do not also constitute torts under state law are cognizable under the FTCA.

*Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 52 U.S.L.W. 3687 (U.S. Mar. 19, 1984); *see also Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978) (constitutional violations are not actionable under the FTCA). Civil rights claims made under the FTCA would be subject to the same objection.

## CONCLUSION

For the above cited reasons, defendant's motion to dismiss must be granted. This ruling is not a fresh appraisal of the merits of the wartime decision, based on what now appears to be a questionable rationale of military necessity, to intern 120,000 citizens and residents because of their race.<sup>36</sup> It may be that timely claims on their behalf would have prevailed. But it is now close to forty years after the camps were closed, and almost that long after the facts essential to those claims were published. Much time has passed, memories have dimmed, and many of the actors have died.<sup>37</sup> These concerns are reflected in the statutes of limitation, and it is those statutes which present the ultimate bar to plaintiffs' claims.

In holding that plaintiffs' claims are time barred, the Court is mindful of this Circuit's warning that there is an "inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense." *Richards v. Mileski*, 662 F.2d 65, 73 (D.C. Cir. 1981). Often, plaintiffs can find material issues of fact which require evidentiary hearings or at least a boiling down of factual disputes by a summary judgment process.

The granting of a motion to dismiss on limitations grounds is appropriate where, as here, the motion challenges the Court's subject matter jurisdiction on the basis of the pleadings and historical records. *See D.C. Transit System, Inc. v. United States*, *supra* note 4, at 1440 n.1; *Capitol Industries-EMI, Inc. v. Bennett*, 621 F.2d 1107, 1118 (9th Cir.), *cert. denied*, 103 S. Ct. 570 (1982).<sup>38</sup> The statute of limitations issue has been exhaustively briefed in the motion to dismiss, response, and reply and

<sup>36</sup> In 1976, President Gerald Ford formally repealed Executive Order No. 9066 and stated that the evacuation was one of our "national mistakes" and was "wrong." Proclamation 4417, 41 *Fed. Reg.* 7741 (Feb. 20, 1976).

<sup>37</sup> For example, General DeWitt, a critical witness, died in 1962.

<sup>38</sup> *See also* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1350, at 139-40 (Supp. 1984).



in supplemental briefs and replies requested by the Court. Oral argument was heard by the Court. The facts relevant to the motion are set out in the complaint, official documents filed with the complaint, *Personal Justice Denied*, and other historical writings publicized about the evacuation and internment.<sup>39</sup> There are no disputes about material facts relevant to the Court's conclusion.

Plaintiffs strenuously contend that those who suffered the evacuation and internment have not been adequately compensated. The Commission on Wartime Relocation and Internment of Civilians recommended that Congress create a \$1.5 billion fund from which compensatory payments of \$20,000 would be made to each present survivor of the evacuation and internment. The remainder would be used for public educational purposes and for the general welfare of the Japanese American community. Bills are now before Congress that would implement some or all of these recommendations.<sup>40</sup> The careful spadework which plaintiffs have done in the prosecution of their claims in court should contribute to making their argument to Congress more persuasive. And it may be that Congress will focus more closely on these claims once plaintiffs have exhausted their possible judicial remedies.

Date: May 17, 1984

/s/ LOUIS F. OBERDORFER  
United States District Judge

<sup>39</sup> All of these sources may properly be considered by a court ruling on a motion to dismiss a complaint as time barred. See 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1350, at 549-50 (1969).

<sup>40</sup> See, e.g., S. 2166, 98th Cong., 1st Sess. (1983); H.R. 4110, 98th Cong., 1st Sess. (1983); H.R. 3387, 98th Cong., 1st Sess. (1983); S. 1520, 98th Cong., 1st Sess. (1983).

In dealing with the American Indians, Congress encountered a similar situation, in which Indian tribes were denied a forum to bring treaty-based claims against the United States by the doctrine of sovereign immunity. Congress responded by creating the Indian Claims Commission. See *Cohen's Handbook of Federal Indian Law* 563-64 (R. Strickland ed. 1982). The American-Japanese Evacuation Claims Act was a step in this direction but was significantly limited in the scope of relief it granted.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Filed Aug. 8, 1983

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NATIONAL COUNCIL FOR  
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PLAINTIFFS

v.

THE UNITED STATES OF AMERICA,  
Serve: The Honorable William French Smith  
Attorney General of the United States  
Department of Justice  
Constitution Avenue between  
9th and 10th Street, N.W.  
Washington, D.C. 20530

and

Stanley S. Harris, Esquire  
United States Attorney for  
the District of Columbia  
United States Courthouse  
3rd & Constitution Avenue, N.W.  
Washington, D.C. 20001

DEFENDANT

AMENDED COMPLAINT FOR MONETARY AND  
DECLARATORY RELIEF FOR VIOLATION OF  
PLAINTIFFS' CONSTITUTIONAL RIGHTS OF  
DUE PROCESS, EQUAL PROTECTION, JUST  
COMPENSATION, SPEECH, PETITION, PRI-  
VACY, TRAVEL, FREEDOM FROM UNREASON-  
ABLE SEARCH AND SEIZURE, FREEDOM  
FROM CRUEL AND UNUSUAL PUNISHMENT,  
BREACHES OF CONTRACT AND FIDUCIARY  
DUTY, AND CIVIL, STATUTORY, AND COM-  
MON LAW RIGHTS

[COMPLAINT]

INTRODUCTION

1. This is a class action brought on behalf of approximately 120,000 American citizens and other residents of the United States who, solely because of their Japanese ancestry, were subjected to forcible segregation, arrest, exclusion, imprisonment, and other deprivations of their most fundamental constitutional rights during World War II by defendant the United States of America (hereinafter the "defendant" or the "United States").

2. In 1980, Congress for the first time mandated a full review of the facts and circumstances underlying these deprivations, and assigned this duty to a specially created Commission on Wartime Relocation and Internment of Civilians (hereinafter the "Commission"), pursuant to P.L. 96-317. The Commission held 20 days of hearings and received testimony from more than 750 witnesses, including government officials, public figures, historians, and hundreds of Americans of Japanese ancestry who were subjected to wartime deprivations. The Commission also conducted extensive independent archival research of the original records of the government's actions, resulting in the location, declassification, and release of many crucial documents which had never before been subjected to public scrutiny. Based on this testimony and research,

the Commission on February 24, 1983 issued its authoritative report, entitled *Personal Justice Denied*.

3. The Commission concludes that defendant's treatment of the plaintiff class "was not justified by military necessity," and that the imprisonment and continued exclusion of plaintiffs from the West Coast of the United States "were not driven by analysis of military factors." Rather, these wartime deprivations were caused by "race prejudice, war hysteria, and a failure of political leadership." *Personal Justice Denied*, p. 18.

4. Recently obtained evidence also demonstrates, as hereinafter alleged, that at the time of these actions responsible United States officials *knew* their actions were in direct contradiction to authoritative intelligence reports already in defendant's possession attesting to the loyalty of the plaintiff class and the absence of any need to subject them to mass deprivations of their civil rights.

5. Newly discovered evidence further establishes that defendant has engaged in a long-standing conspiracy to deprive the plaintiff class of judicial redress for defendant's unlawful actions, by intentionally misrepresenting and suppressing information in defendant's possession which attested to plaintiffs' loyalty to the United States; by making false and patently racist claims concerning alleged disloyal acts and propensities of plaintiffs; by attempting to revoke plaintiffs' rights of citizenship and *habeas corpus*; by maliciously interfering with plaintiffs' access to the courts; and by punishing and threatening plaintiffs for challenging the legality of defendant's actions against them.

6. Defendant's actions have inflicted manifest personal injustice on plaintiffs, including massive deprivations of plaintiffs' constitutional rights as Americans; loss of their homes, businesses, education, and careers; severe physical and psychological injuries; loss of life; destruction of family ties; and tremendous personal stigma. The Commission finds plaintiffs have never received full or fair compensation for these injuries.



7. Plaintiffs now seek compensation for the injuries defendant inflicted upon them solely on account of their race and national ancestry, and a judicial declaration of the manifest injustice done to them.

### JURISDICTION

8. This Court has jurisdiction of this action pursuant to 5 U.S.C. § 702; 28 U.S.C. §§ 1331, 1343, 1346(a)(2), 1346(b), 1651, and 2201-2; and 50 U.S.C. App. §§ 1981-1987. This action arises under the First, Fourth, Fifth, Sixth, Eighth, Ninth and Thirteenth Amendments and other provisions of the Constitution of the United States; the Civil Rights Acts, 42 U.S.C. §§ 1981-1988; the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.*; and other statutory and common law rights of the states and federal government. The matter in controversy with respect to all causes of action hereinafter enumerated, except those sounding in tort, does not exceed \$10,000 for each cause of action by each plaintiff.

### PLAINTIFFS

9. Named individual plaintiffs are United States citizens and residents of Japanese ancestry, and representatives of such persons no longer living, who reside at the addresses set forth in the caption of this Complaint. These plaintiffs sue individually and as representatives of the class of approximately 120,000 persons of Japanese ancestry in the United States who were subjected to forcible segregation, arrest, exclusion, imprisonment, and other deprivations of their liberties during World War II pursuant to Presidential Proclamation 2525, Executive Order 9066, or other actions and orders of the United States, its officers, agents, and employees.

10. Plaintiff William Hohri is an American citizen of Japanese ancestry. On the night of December 7, 1941, Federal Bureau of Investigation (FBI) agents came to his home in North Hollywood, California and seized and

imprisoned his father, a Methodist clergyman, without any warrant, notice of charges against him, or explanation of where he was being taken. Plaintiff Hohri was separated from his father for the next two and one-half years. In April 1942, U.S. officials forced Plaintiff Hohri, then age 15, and the remainder of his family into a prison camp in Manzanar, California, where they were surrounded by barbed wire, armed guards, and watch towers. The camp had only primitive communal eating and bathing facilities, which were grossly inadequate for the lengthy imprisonment of American families. He was denied privacy, furniture, and other facilities for basic human needs. His family life was destroyed by the conditions in the camp. He saw his brother become gravely ill from tuberculosis due to inadequate medical care and other conditions in the camps. Formerly a straight-A student, he was denied schooling until late 1942 and then was subjected to such substandard schools that he lost all interest in furthering his education. His self-esteem as an American citizen was seriously injured by the United States' discrimination against him. He suffered irreparable loss of his liberty and the normal pursuits of a young life. No redress or compensation has been provided to Plaintiff Hohri for these personal injustices.

11. Plaintiff Hannah Takagi Holmes is an American citizen of Japanese ancestry. She has been deaf since the age of two. In May 1942, when she was barely 14 years old, the U.S. military seized her and her family, and forced them onto trains patrolled by heavily armed U.S. soldiers, destined for detention camps. She was terrified about what would happen to her and thought she was being taken to a death camp. U.S. officials in the camps denied her schooling because of her deafness, and forbade her from using the only method of communication available to her, American sign language. She was forced to work in the camp's camouflage net factory, for negligible or no compensation. As a result of the United States' actions against her, she has suffered severe educational

and psychological injury, stigmatization, and hostility solely on account of her Japanese ancestry, without compensation or other reparation by the United States.

12. Plaintiff Chizuko Omori is a third generation American citizen of Japanese ancestry. In May 1942, her life as an ordinary 12-year old child was harshly interrupted by her forced exile to a detention camp in the deserts of Arizona, where she lived in terror, confusion, and embitterment. She knew she was an American and wanted to be treated as an American, but her mother asked her, "If you are truly an American, what are you doing in this camp?" Plaintiff Chizuko Omori has never found an answer to that question. The anger and grief to which she was subjected in the camps have caused her irreparable psychological injury and destruction of family ties, for which she has never received any compensation or declaration of wrongdoing by the United States.

13. Haruko Omori, deceased, was an American citizen of Japanese ancestry who is here represented by her daughter, Plaintiff Chizuko Omori. In early 1942, she was illegally uprooted from her home in California and forced at gunpoint onto crowded trains that took her to a detention camp called Poston I, deep in the deserts of Arizona. There, she and her family, all second and third generation Americans, were confined in a tar-paper barrack behind barbed wire and armed guards, cut off from all contact with the outside world, and forced to exist in a harsh life for three and one-half years. She was embittered by the incarceration and by U.S. orders that she swear an oath of loyalty to the United States, after that same government had imprisoned her in a detention camp. The defendant's actions caused her alienation, grief, and irreparable psychological injury, which led to her death by bleeding ulcers at age 35, within a short time following her release from the camps. No compensation or other redress was ever provided to Haruko Omori or her survivors.

14. Plaintiff Midori Kimura is a permanent resident of the United States who came here from Japan in 1919 to marry her husband. By 1942, she and her husband had lived in their home in San Jose for 22 years, had seven children, and were enjoying a happy, prosperous life, even though she was denied U.S. citizenship due to discriminatory naturalization laws. In May 1942, the United States inexplicably ordered Plaintiff Kimura and her family banished from their home and forced them into prison camps in Santa Anita, California and Heart Mountain, Wyoming. She suffered unbearable fear and pain from seeing her children—all American citizens—confined behind barbed wire by armed guards. For over three years, she lived a life filled with terror of an unknown future and numerous hardships in the camps. She suffered a complete lack of privacy and means of preserving her family discipline and lifestyle. Her family was forced to separate in order to survive; her husband died of stress following this imprisonment. Plaintiff Kimura was denied any redress or compensation these deprivations and losses.

15. Plaintiff Merry Omori is an American citizen of Japanese ancestry. In 1942, she was twelve years old and one of nine children, all between two and sixteen years of age, whose mother had recently died. In May 1942, the United States ordered her entire family incarcerated, forcing them to abandon a successful farming business, valuable equipment, and their house with all their furniture and belongings. Soon after their forced departure, their house was burned and of all the family's belongings were looted, stolen, or destroyed, due to defendant's failure to protect their property. In the Walerga detention camp in Sacramento, California, her "family unit" of twelve persons lived in a single, twenty-by-twenty foot room with no privacy, toilets, or running water. Open sewer trenches ran between the barracks. She was subsequently forced to move to a prison camp in Tule Lake, California, where tanks and armed guards patrolled the



camp perimeters. An American citizen by birth, she was tear-gassed, despised, rejected, scorned, and placed in daily fear of her life in the camps due solely to her Japanese ancestry. Defendant has failed to provide redress or compensation for these injuries.

16. Plaintiff John Omori is an American citizen of Japanese ancestry. In 1941, he was a high school student aiming for a college sports scholarship. In May 1942, he was forcibly expelled from his community and imprisoned in a detention camp in Poston, Arizona. He remained in United States custody for over three years. Due to defendant's wrongful acts, his family's and his own personal property was lost or stolen, the family was separated for most of the war, and Plaintiff John Omori suffered psychological and emotional trauma. He volunteered to serve in the Navy, Marines, or Coast Guard, but was rejected solely because of his race. He refused to be drafted into the Army because the Army was imprisoning his family solely because of their race; as a result, he was arrested, jailed, and convicted of his resistance. Following the end of the war, Plaintiff Omori served his country in the U.S. Army. Defendant has failed to provide compensation and redress for these personal injustices.

17. Juro Omori, deceased, is represented here by his son, Plaintiff John Omori. The elder Mr. Omori came to America at age eighteen. By 1941, he had lived in the United States for 35 years and was a prosperous farmer, but was denied U.S. citizenship solely due to his Japanese ancestry. On December 8, 1941, FBI agents entered his house without search or arrest warrants, seized and destroyed certain personal property, and threatened to shoot him. He was subsequently arrested without notice of any charges against him, and imprisoned in local jails and federal prison camps, where he was threatened by armed U.S. officials, prohibited from notifying his family of his whereabouts, and subjected to life-threatening conditions. When he complained to U.S. officials about the

inadequate food and medical care provided in the prison camp at Poston, Arizona, he was rearrested, and subjected to further threats and punitive measures. His good reputation and business were ruined by defendant's actions against him. He was forced to remain in the detention camps until they closed in 1946. During his four and one-half years of imprisonment by the defendant United States, he was never provided any warrant, notice of any charges against him, proof of any wrongdoing, or compensation for the wrongful actions taken against him.

18. Plaintiff Gladys Sumida is an American citizen of Japanese ancestry, born in Fresno, California. In early 1942, when she was only ten years old, she and her family lived in daily fear of being seized from their home and placed in prison camps, due to U.S. actions against persons of their race. Her family destroyed records and other items hinting of Japanese culture and surrendered, without compensation, items which defendant had declared "contraband" for Japanese Americans. Despite their loyalty and caution, Plaintiff Sumida and her family were subjected to illegal searches, driven from their home, and incarcerated in a prison camp in Gila River, Arizona for a period of two and one-half years. Due to the United States' failure to protect the property which the family had been forced to leave behind, their property was ransacked and destroyed. Plaintiff Sumida, now a resident of the District of Columbia, has been grievously injured by being forced to live her childhood in the confines of a prison camp, solely because of her race and national ancestry. No redress has ever been provided for these wrongs.

19. Plaintiff Kyoshiro Tokunaga was, in 1942, a permanent resident of the United States who had immigrated here from Japan, but who was barred from becoming a U.S. citizen due to discriminatory naturalization laws. In early 1942, Plaintiff Tokunaga was 35 years old and was a respected leader in the Japanese American com-



munity in Los Angeles, California, where he taught in three schools for Japanese Americans. On March 13, 1942, FBI agents surreptitiously entered his home and illegally searched and ransacked all his personal papers and belongings, without his knowledge or consent. Plaintiff Tokunaga was arrested without warrant or evidence of wrongdoing. Over the next four and one-half years, he was imprisoned in numerous jails and prison camps, mostly in the custody of Army or Department of Justice officials. There, he was subjected to inhumane conditions, forced labor, censorship of his communications, and threats by federal officials. When he petitioned for his release after the war, he was further threatened with deportation. He was finally released from the camps in November 1946, some fifteen months after the cessation of hostilities against Japan. As a result of defendant's actions against him, Plaintiff Tokunaga has suffered extreme deprivations of liberty, destruction of his personal property, loss of income and reputation, and other injuries. Defendant has failed to provide him any redress for these injuries.

20. Plaintiff Tom Nakao is an American citizen of Japanese ancestry. In May 1942, when he was a 17-year old high school student in Sacramento, California, he and his family were expelled from their home and forced into prison camps, first at Marysville, California, then at Tule Lake, California and Topaz, Utah. Due to defendant's actions, they lost their successful farming business at peak season, their home was burned down upon their departure, and their tools, equipment, and car were stolen. While in the camps, Plaintiff Nakao was severely injured and incapacitated for eight months due to the negligence and inadequate medical care of camp officials. Plaintiff Nakao was maliciously denied requests for leave clearance from the camps, at the same time he was repeatedly pressured to serve on combat duty for the United States. Plaintiff Nakao has suffered continuing physical, financial, and psychological injuries as a result of these ac-

tions against him, but defendant has failed to provide him full or fair compensation for these injuries.

21. Plaintiff Harry Ueno is an American citizen of Japanese ancestry. In early 1942 his successful business career and family life were interrupted by U.S. orders forcing him into a detention camp in Manzanar, California. There, he called public attention to shortages of essential foods in the camp's diet; as a result, defendant subjected him to harassment and punishment. In December, 1942, he was wrongfully arrested by defendant, causing a mass gathering and protest by camp residents. Defendant fired into the defenseless crowd with guns and teargas, wounding and killing several innocent residents. He was subsequently incarcerated in numerous local jails and special high security prison camps, where he was subjected to constant threats and brutality by U.S. officials, denied basic food, hygiene, and other human needs, and prohibited from communicating with his family. Each protest on his part brought increased punishment, inhuman treatment, and threats to his life. The U.S. promised him a fair hearing but never provided him a trial or any semblance of a hearing, never informed him of any charges against him, and never provided him full or fair compensation according to law.

22. Plaintiff Edward Tokeshi is an American citizen of Japanese ancestry. In the Spring of 1942, he was finishing his last semester at the University of California/Berkeley and had plans for marriage and career following his graduation that June. His plans were harshly interrupted by U.S. orders forcing him into prison camps, first in Pomona, California and then at Heart Mountain, Wyoming. At great financial loss he was forced to sell his farm, crops, equipment, and business, and to abandon all of his personal property, which was subsequently stolen. The financial ruin and personal upheavals caused by detention, combined with his forced departure from college, subjected him to years of lost income and lost business opportunities. Despite Plaintiff Tokeshi's Ameri-

can citizenship and willingness to prove his loyalty to the United States by serving in combat duty, he was inexplicably classified as an "unacceptable alien." He was forced to speed up his plans for marriage, and he and his young bride, both loyal American citizens, began their life together behind the barbed wire confines of the prison camps. Defendant has never provided full or fair compensation to Plaintiff Tokeshi for this manifest injustice.

23. Plaintiff Kinnosuke Hashimoto was, in 1942, a permanent resident of the United States and lived in Oakland, California with his wife and four children, who were American citizens by birth. Despite discriminatory federal laws denying him United States citizenship, he was a successful businessman, earning over \$15,000 per year. In the Spring of 1942, he and his family were ordered, without cause, to abandon their home and business, and to enter prison camps at Tanforan, California and Topaz, Utah. As a result of being uprooted and imprisoned, Plaintiff Hashimoto incurred substantial financial losses on his business, investments, and personal property, and severe losses of liberty and reputation. Although he swore his loyalty to the United States, he was imprisoned for two and one-half years. His wife and two of his children were imprisoned for three and one-half years. Plaintiff Hashimoto is now over 90 years of age; following his release from imprisonment and the repeal of discriminatory naturalization laws, he became a United States citizen, but the U.S. has never provided redress for the grave injustices done to him.

24. Plaintiff Nelson Yuji Kitsuse is an American citizen of Japanese ancestry who in early 1942 was a student at the University of Southern California. Without evidence that he was engaged in any illegal activity whatsoever, he was subjected to racial curfew and travel restrictions, and then forced to terminate his studies and surrender his freedom, solely on account of his Japanese ancestry. In May 1942, he was forcibly incarcerated in

a detention camp in Poston, Arizona. He was subsequently drafted and he served in the U.S. Army for two years. Because of the United States' illegal actions against him, Plaintiff Kitsuse suffered grievous loss of his personal freedom, damage to his education, and other personal injuries, for which he has never been compensated.

25. Takeshi Kitsuse, deceased, was a permanent resident of the United States who is here represented by his son, Plaintiff Nelson Yuji Kitsuse. In 1942, the elder Mr. Kitsuse was 63, had lived most of his adult life in the United States, and had built a happy, prosperous life while working as a foreman for the American Fruit Growers. By U.S. orders, he and his family were banished from their home, business, and community, their property was subsequently stolen or destroyed, and the family was incarcerated in a detention camp in Poston, Arizona. The United States had, without any cause, transformed his good reputation into that of an allegedly terrible enemy of America, solely on account of his Japanese ancestry. Defendant caused him great psychological pain, financial ruin, and shame, and has never provided full or fair compensation to him or his survivors.

26. Plaintiff Eddie Sato is an American citizen of Japanese ancestry. In early 1942, he was a recent high school graduate and held a responsible job in a bakery. In May 1942, he was uprooted from his home, community, and job, and was forcibly incarcerated in detention camps, first in Puyallup, Washington, and then in Minidoka, Idaho. While in the detention camp, he was recruited for and volunteered to serve in the U.S. Army's 442nd Regimental Combat Team (hereinafter the 442nd RCT), a racially segregated Army unit consisting solely of Americans of Japanese ancestry. He served his country valiantly until his discharge in November 1945. Due to defendant's actions, Plaintiff Sato has suffered severe loss of earnings and business opportunities, and psychological



injury, without full and fair compensation according to law.

27. Plaintiff Sam Ozaki is an American citizen of Japanese ancestry. In early 1942, while he was still a high-school student, he was forced into a detention camp, euphemistically called an "assembly center," at the Santa Anita Race Track in California. There, whole families were housed in horse stalls and other inhumane quarters, and were denied basic hygiene, food, and medical care. He was subsequently transferred to a detention camp in the hot, humid swamplands of Jerome, Arkansas. At the same time defendant incarcerated Plaintiff Ozaki because of his race, it also sought to recruit him for the 442nd RCT. He volunteered and served in the 442nd RCT from 1944 to 1946. He was prevented from seeking redress for defendant's discriminatory actions by the United States' improperly-procured Supreme Court decisions condoning U.S. actions, and by his fear of U.S. retaliation against him. These actions by the United States subjected Plaintiff Ozaki to profound psychological and emotional injury, loss of his good reputation, and disruption of his education, without full or fair compensation according to law.

28. Kyujiro Ozaki, deceased, was a permanent resident of the United States who is here represented by his son, Plaintiff Sam Ozaki. In early 1942, the elder Mr. Ozaki was 65 years old. Even though denied United States citizenship due to his Japanese ancestry, he had built a thriving fertilizer sales business in California, and had three children in college. In February 1942 he was illegally arrested by U.S. officials, without warrant or charges against him. He was incarcerated in numerous local jails and prison camps, was subjected to threats and inhumane conditions, and was denied communication with his family. He was emotionally devastated by his helplessness to prevent U.S. officials from driving his family from their home and schools into detention camps. As a result of U.S. actions against him and his family during

his three and one-half years of illegal incarceration, Mr. Ozaki was a spiritually broken man, and was never able to regain his self-dignity. No reparations for this manifest personal injustice have ever been made.

29. Plaintiff Kumao Toda, a resident of the District of Columbia, is an American citizen of Japanese ancestry, born in Los Angeles, California. In early 1942 he was nineteen years old, taking night classes at UCLA, and working during the day to help support his family. In April 1942, he and his family were driven from their home into prison camps at the Santa Anita Race Track, California, and Rohwer, Arkansas. After the United States government had uprooted him, treated him as an enemy alien, and imprisoned him in a barbed wire enclosed camp for over a year, that same government demanded that he sign a "loyalty questionnaire," stating whether he would swear unqualified allegiance to the United States and would serve on combat duty, wherever ordered. He was subsequently drafted into the U.S. Army, where he served his country valiantly for four years in a military and then in a civilian capacity in Japan. As a result of United States actions against him, Plaintiff Toda has been deprived of his most cherished liberties and rights of citizenship, without compensation or other form of redress.

30. Suketaro Toda was a permanent resident of the United States, now deceased, who is here represented by his son, Plaintiff Kumao Toda. The elder Mr. Toda ran a successful beer and wine distributorship in Los Angeles, but following the attack on Pearl Harbor, his assets were frozen and he was forced to close his business, solely because of his Japanese ancestry. After that time, he had no source of income for his family's livelihood or his children's education. In April 1942, the United States ordered him and his family to enter prison camps, causing the loss of all of his business interests, earnings, and personal property. Despite his statements that he was loyal to the United States and would abide by all laws,



he was imprisoned for three years, first at Santa Anita, California, then at Rohwer, Arkansas. As a result of defendant's actions against him, the prosperous life and security Mr. Toda had built for his family were destroyed, without redress or compensation.

31. Plaintiff Kaz Oshiki is an American citizen of Japanese ancestry. In early 1942, when he was a 17-year old college student, he was driven from his home, school, and community, and forced into detention camps, first at Santa Anita, California, then at Rohwer, Arkansas. There he was deprived of his freedom and subjected to squalid living conditions, causing him tremendous bitterness. He subsequently volunteered for the Army's Military Intelligence Service Language School, and thereafter served in the Pacific Theater. Plaintiff Oshiki, now a resident of the District of Columbia, has suffered substantial personal and financial hardships, and injury to his good reputation due to United States actions against him, which personal injustices have never been remedied.

32. Plaintiff George Ikeda is an American citizen of Japanese ancestry. In March 1942, he and his family were driven from their farm in Watsonville, California, forced to abandon their crops, equipment, vehicles, and personal property, and were imprisoned in camps at Salinas, California, and Poston, Arizona. The prison camps were miserable and demoralizing, and deprived him of every right of his citizenship. He was violently assaulted and humiliated by a police officer, who claimed that "these damn Japs" should be "sent to the front lines." The United States in fact subsequently tried to induct Plaintiff Ikeda and other Japanese Americans in the prison camps into combat service. Plaintiff Ikeda responded that because of United States' actions against him, he was a man without a country and he refused to be inducted. By February 1945, however, he was no longer able to tolerate the conditions in the camps, and so agreed to serve, and did serve, in the U.S. Navy. Due to United

States actions against him, Plaintiff Ikeda has suffered severe physical injury, mental anguish, and loss of his rights, without full and fair compensation as accorded by law.

33. Plaintiff Theresa Takayoshi is an American citizen of Japanese ancestry. In early 1942 she owned an ice cream parlor with her husband in Seattle, Washington, where they earned about \$500 per month. In May 1942, she and her family, all second and third generation Americans, were forcibly uprooted from their home and business, and incarcerated in a detention camp at Puyallup, Washington, solely on account of their Japanese ancestry. They lost over \$10,000 in business assets, good will, and personal belongings. In the camp, she and her husband were paid wages of \$12 to \$19 per month, which they used to try to provide their family with warm clothes for the harsh winters. Plaintiff Takayoshi and others were told that if their men did not volunteer for the 442nd RCT, they would never get out of the camps. Accordingly, she helped recruit the younger men for the Army, and her own husband served in the 442nd RCT. Defendant has failed to provide Plaintiff Takayoshi redress for these grievous actions against her.

34. Tomeu Takayoshi, deceased, was an American citizen of Japanese ancestry who is here represented by his widow, Plaintiff Theresa Takayoshi. In early 1942, Mr. Takayoshi and his family were forced into prison camps at Puyallup, Washington and Minidoka, Idaho. There he was daily subjected to inhumane conditions and deprivations of his most cherished constitutional rights. He suffered permanent disability due to inadequate medical care in the camps. He saw his son become gravely ill from food poisoning in the camps; when Mr. Takayoshi sought to inquire as to his condition, he was threatened and assaulted by armed camp officials. He was further threatened that if he didn't "volunteer" for combat duty, he might never get out of the camps. Accordingly, he served in the 442nd RCT, until he was discharged for medical

injuries. Due to defendant's actions against him, Mr. Takayoshi suffered great loss of liberty, property, and reputation, without full or fair compensation for these grave personal injustices.

35. Plaintiff National Council for Japanese American Redress is an organization dedicated to the judicial redress of deprivations of constitutional rights and other injuries inflicted upon persons of Japanese ancestry as a result of United States actions during World War II. The Council includes Americans of Japanese ancestry, and friends and descendants of such persons, who seek redress for the segregation, arrest, exclusion, imprisonment, and other losses of liberties inflicted on plaintiffs during World War II solely because of their race and national ancestry.

#### DEFENDANT

36. Defendant United States of America, by Executive Orders, military orders, and other related actions, subjected plaintiffs to forcible segregation, arrest, exclusion, imprisonment, and other losses of their liberties without lawful or rational reason, solely on the basis of their Japanese ancestry.

#### CLASS ACTION ALLEGATIONS

37. The individual named plaintiffs sue on their own behalf and on behalf of all other persons similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class consists of approximately 120,000 American citizens and American residents of Japanese ancestry, or descendants of such persons no longer living, who were subjected to forcible segregation, arrest, exclusion, imprisonment or other restrictions pursuant to Presidential Proclamation 2525, Executive Order 9066, or other orders or actions by the United States, its officers, agents, and employees.

38. This class of 120,000 persons is so numerous that joinder of all members is impractical, indeed, impossible.

A class action is the only effective device for adjudicating their claims.

39. As hereinafter alleged, there are questions of law and fact common to the class. These questions relate to the illegality of defendant's forcible segregation, arrest, exclusion, and imprisonment of the plaintiff class; to evidence in defendant's possession clearly attesting to the loyalty of the plaintiff class; and to defendant's past and continuing misrepresentations and suppression of that evidence in order to conceal its unlawful basis, *i.e.*, solely on the basis of Japanese ancestry, and cause injuries and deprivations of rights common to the class.

40. The named plaintiffs assert claims typical of those of the class. Named plaintiffs were subjected to the same arbitrary actions, and suffered injuries and deprivations of rights similar to those suffered by other members of the class.

41. Named plaintiffs, with their undersigned counsel, will diligently and fairly protect the interests of the class and will insure full and fair hearing of the common issues of law and fact.

42. This suit is properly maintainable as a class action pursuant to Rule 23, Federal Rules of Civil Procedure, subsections (b) (1), (b) (2), and (b) (3), as follows:

(b) (1) The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications, which would establish incompatible standards of conduct for the defendant. Adjudications with respect to individual members of the class might as a practical matter be dispositive of the interests of other members not parties to the adjudications, or substantially impair or impede their ability to protect their interests.

(b) (2) Defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate declaratory and other relief with respect to



the class as a whole, inasmuch as defendant segregated, excluded, imprisoned, and in other ways deprived fundamental rights of the class solely on the basis of their race and national ancestry, without regard to individual characteristics. Likewise, the defendant's continuing misrepresentations and suppression of evidence are directed to the class and not to any individual member.

(b) (3) Questions of law and fact common to the members of the class predominate over any question affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy, inasmuch as:

(1) Due to the complex historical and legal proof required in this action, individual class members would have little ability or interest in individually controlling the prosecution of separate actions, whereas the class action format provides similarly-situated individuals the ability to unite in the efficient and orderly prosecution of their claims.

(2) No prior class action has been brought for similar declaratory and compensatory relief. The few individual claims or defenses against the United States raised contemporaneously with the wartime actions alleged herein were denied or lost due to the defendant's affirmative misrepresentations, suppressions of evidence, and other conspiracies alleged herein, which precluded any fair hearing or redress to all members of the class.

(3) It is highly desirable to concentrate the class members' claims in the instant forum for reasons of judicial economy and cost savings for all litigants. Most of the crucial military, executive, legislative, and judicial actions herein alleged occurred in the District of Columbia, where this suit is brought. Massive documentary data on U.S. actions against the plaintiff class is also located in the National Archives, in Washington, D.C. The arrests, segregation, exclusion, and imprisonment herein alleged took place in well over a dozen states and

territories, necessitating the choice of a single forum for the efficient prosecution of claims on behalf of the class.

(4) This case will be a manageable class action, inasmuch as the class members' identities are ascertainable from detailed archival records of the prison camps held by defendant, principally in Washington, D.C. Notices and communications can flow to members of the class through Japanese American newspapers, organizations, and other cultural networks, and there is a cohesive, stable organization, *i.e.*, the Plaintiff National Council for Japanese American Redress, to assist the court and class members in proceeding with the present action.

#### FACTUAL ALLEGATIONS

43. Following the outbreak of World War II, defendant maliciously and unlawfully conspired to and did deprive plaintiffs of their constitutional rights by subjecting them to forcible segregation, arrest, exclusion, and imprisonment solely on the basis of their Japanese ancestry. Defendant intentionally concealed and misrepresented the illegal nature of its actions by fabricating claims of "military necessity."

44. The wartime actions alleged herein followed years of racial hostility and invidious discrimination imposed on plaintiffs by defendant the United States and other public officials. For example, the United States had enacted discriminatory legislation prohibiting Japanese immigrants from becoming naturalized U.S. citizens and, beginning in 1924, had prohibited any further immigration from Japan altogether.<sup>1</sup> By law and/or custom in the West Coast states, many Japanese-Americans were subjected to segregation, exclusion, or restriction from employment, housing, business practices, and public

<sup>1</sup> See 8 USC §703, Immigration Act of 1924; 43 Stat. 161. The discriminatory naturalization law was not repealed until 1952.



schools. The Issei,<sup>2</sup> or Japanese immigrants who were denied U.S. citizenship, suffered particularly harsh discrimination, including prohibitions on ownership and use rights of land.

45. More than one year before the outbreak of the war, proposals were made at the highest levels of the United States government that "concentration camps" should be built for imprisoning plaintiffs in the event of "trouble" and in order to "impress" the Imperial Japanese government about the seriousness of our preparations for war. (See, Memorandum from Secretary of Navy Knox to President Roosevelt, dated October 9, 1940, copy attached as Exhibit A; Memorandum from President Roosevelt to Chief of Naval Operations, August 10, 1936, copy attached as Exhibit B). By information and belief, immediately prior to the war, high officials of the United States government sought the names and addresses of all persons of Japanese ancestry in the United States, and breached the confidentiality of Census Bureau records, for the purpose of planning certain reprisals or taking discriminatory action against these persons. *Personal Justice Denied*, pp. 104-5, fn.

46. During this same time, however, United States agencies and officials responsible for domestic security consistently reported that in the event of war between the United States and Japan, normal security measures would be adequate to identify and control potentially dangerous persons of Japanese ancestry. Further, they stated it would be unnecessary and potentially dangerous to apply security measures to an entire race or nationality group without regard for the loyalty or citizenship of the individuals involved.

47. Prior to World War II, the FBI and the Office of Naval Intelligence ("ONI") shared primary responsibility for identifying and monitoring civilians of Japanese

<sup>2</sup> The first generation, or immigrants, are referred to as "Issei;" their American-born children (U.S. citizens) are the "Nisei;" the Nisei's children are referred to as "Sansei."

ancestry who were believed to be dangerous to the United States in the event of war; the War Department had no such responsibility.

48. The FBI maintained lists of persons of Japanese ancestry who were thought to be *potentially* dangerous to the national security. These lists were broadly drawn and identified approximately 2,000 persons who were "suspect" only because they engaged in activities and occupations such as fishermen, produce distributors, Shinto and Buddhist priests, influential businessmen, Japanese language instructors, martial arts instructors, travel agents, Japanese newspaper editors, and recent travelers to Japan.

49. Prior to the United States' entry into World War II, the FBI and ONI had ascertained the identities of all persons who might act as agents on behalf of the Japanese Government, by prior intelligence gathering activities and by means of a secret break-in at the Japanese Consulate in Los Angeles in March, 1941. As a result of these activities, the FBI and ONI undertook surveillance of this limited number of potentially dangerous persons, but this investigation did *not* produce any evidence of potential espionage or sabotage activities by Americans of Japanese ancestry.

50. In November 1941, a comprehensive and confidential report on the loyalty of Americans of Japanese ancestry was sent to President Roosevelt and, by express request of the President, also to Secretary of War Henry L. Stimson. This report was authorized by Curtis B. Munson, on detail to the U.S. State Department, and was based on extensive discussions with FBI and ONI intelligence officials, as well as British Intelligence. In this report, Munson concluded:

"There is no Japanese 'problem' on the Coast. There will be no armed uprising of Japanese. . . . For the most part the local Japanese are loyal to the United States or, at worst, hope that by remaining

quiet they can avoid concentration camps or irresponsible mobs. We do not believe that they would be at least any more disloyal than any other racial group in the United States with whom we went to war."

Excerpts of said report are attached hereto as Exhibit C.

51. On December 7, 1941, Imperial Japanese forces attacked Pearl Harbor. The United States subsequently declared war on Japan, Germany, and Italy.

52. Simultaneously with the attack and declaration of war, President Roosevelt issued Presidential Proclamation No. 2525, 6 Fed. Reg. 6321. This Proclamation declared *all* United States residents of Japanese nationality to be "alien enemies," regardless of their demonstrated loyalty to the United States, and authorized the Attorney General to regulate their conduct and to apprehend summarily any such persons "deemed dangerous to the public peace or safety of the United States."

53. Immediately following the Pearl Harbor attack, agents and employees of the United States, acting pursuant to Presidential Proclamation No. 2525, arrested and incarcerated the approximately 2,000 so-called "potentially disloyal" persons of Japanese ancestry on the FBI lists. The defendant further imposed stringent curfew, contraband and travel restrictions, and reporting regulations on all other "alien enemies."

54. The United States arrested and incarcerated these persons without issuance of warrants according to law, without notice of any charges against them, and without provision of a trial to determine their guilt or innocence of any criminal acts. These persons were incarcerated at numerous "internment camps" or other detention facilities operated by the Department of Justice. Many of these persons were incarcerated for the duration of the war, some for periods of five or more years, without legal process or proof of any individual wrongdoing.

55. On January 26, 1942, a confidential report on the "Japanese Question" was issued to the Assistant Secretary of War, The Attorney General, and on information and belief to President Roosevelt. This report was authored by the ONI expert on Japanese intelligence matters, Lt. Commander Kenneth D. Ringle. Ringle concluded that most Americans of Japanese ancestry could be expected to be loyal to the United States in the event of war with Japan, and that the few individuals believed to be potentially dangerous were already known and under control by the FBI. The report noted that "the entire 'Japanese problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people, should be handled on the basis of the *individual*, regardless of citizenship, and *not* on a racial basis." A copy of this report is attached as Exhibit D.

56. The War Department's own intelligence office issued confidential intelligence reports throughout the war, stating that Japan's knowledge of the United States military defenses and status was gained not through post-Pearl Harbor activities of Japanese-Americans, but through pre-war activities of accredited diplomatic, military, and naval attaches.

57. Beginning with the attack on Pearl Harbor and continuing throughout the war, the Federal Communications Commission (FCC) had responsibility for identifying and investigating every report of alleged illegal radio use and signaling. The FCC provided weekly reports to the War Department and other federal officials throughout the war, consistently confirming that there was no evidence of illegal signaling or radio-activities by Americans of Japanese ancestry prior to and during the war. A summary of these FCC activities and findings was provided in a letter dated April 4, 1944, from FCC Chairman James L. Fly to Attorney General Francis Biddle, attached as Exhibit E.

58. In the weeks following the Pearl Harbor attack, the United States unlawfully conspired to violate plain-



tiffs' constitutional rights, with certain federal officials, including John J. McCloy (then Assistant Secretary of War), Lieutenant General John L. DeWitt (then Commanding General of the Western Defense Command and Fourth Army), Colonel Karl R. Bendetsen (then Assistant Chief of Staff for Civil Affairs, Western Defense Command and Fourth Army), certain state officials, and other persons. The object of this unlawful conspiracy was to exile and imprison the entire plaintiff class on the basis of unfounded and patently racist claims that plaintiffs were engaging in numerous acts of espionage and sabotage, that plaintiffs had a racial affinity toward commission of such acts, and that defendant assertedly was unable to distinguish loyal from disloyal persons of Japanese ancestry. *Personal Justice Denied*, pp. 72-92. In flagrant disregard of the defendant's authoritative intelligence information summarized above, and the lack of any disloyal acts by plaintiffs, defendant proceeded to act in furtherance of the unlawful conspiracy, as hereinafter described.

59. In deliberate disregard of plaintiffs' established constitutional rights, defendant unlawfully and maliciously conspired with certain federal and state officials and other persons to design, develop, and implement a plan of exclusion which, while facially neutral, gave defendant absolute discretion in excluding plaintiffs arbitrarily from any designated areas, solely on the basis of their race and without regard to an affected individual's demonstrated loyalty or United States citizenship. On February 3, 1942, General DeWitt informed John J. McCloy of the public clamor for mass exclusion of Americans of Japanese ancestry on the West Coast:

The Governor [of California] said yesterday, I sat on the sidelines . . . that if something isn't done and done very promptly, why in certain sections of the state they're going to take it into their own hands . . . It's the idea of the state authorities, and it's their idea only . . . [I]f they [the Japanese-Americans]

are allowed to remain where they are, we are just going to have one complication after another, because you just can't tell one Jap from another. They all look the same.

McCloy responded with a scheme that purportedly would give "legal" validity to the racist conspiracy:

You see, then we cover ourselves with the legal situation . . . because in spite of the constitution you can eliminate from any military reservation, or any place that is declared to be in substance a military reservation, anyone—any American citizen, and we could exclude everyone and then by a system of permits and licenses permitting those to come back into that area who were necessary to enable that area to function as a living community. Everyone but the Japs.

See excerpts of telephone conversation between General DeWitt and John J. McCloy, dated February 3, 1942, attached as Exhibit F.

60. Defendant intentionally failed to take any actions to halt or dispel the racial hysteria and false rumors on the West Coast, and instead capriciously decided to place the full power and authority of the federal government behind a scheme of invidious racial discrimination. The "Final Recommendation" for this plan, which recommendation was promptly approved and implemented by defendant, relied in large part on the following statement by the Commanding General:

In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized," the racial strains are undiluted. . . . It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese ex-

traction, are at large today. There are indications that these are organized and ready for concerted actions at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.

See Memorandum from General DeWitt to the Secretary of War, dated February 14, 1942 (As contained in defendant's *Final Report: Japanese Evacuation from the West Coast—1942*, p. 34), attached hereto at Exhibit G. Despite pleas from Attorney General Biddle and others for government actions affirming the loyalty and civil rights of Americans of Japanese ancestry, defendant maliciously adopted a plan for their mass removal and imprisonment.

61. As a result of the afore-described conspiracy by defendant with certain federal and state officials and other persons, on February 19, 1942, President Franklin D. Roosevelt issued Executive Order 9066, authorizing the Secretary of War (or a designated Military Commander):

whenever he deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he . . . may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.

Said Executive Order, hereinafter referred to as "EO 9066," is attached as Exhibit H. The following day, Secretary of War Henry L. Stimson appointed General DeWitt as the military commander authorized to issue orders pursuant to EO 9066 in the "Western Defense Command," a theatre of combat operations consisting of the eight westernmost states and the territory of Alaska.

62. Acting pursuant to EO 9066, defendant, beginning in March 1942, imposed stringent curfews, reporting re-

quirements, travel and contraband restrictions, and other losses of liberty on plaintiffs, solely because of their Japanese ancestry and without regard for U.S. citizenship. Plaintiffs were required to be in their residences between the hours of 8:00 p.m. and 6:00 a.m.; at all other times they were required to be at their place of employment or within five miles of their place of residence, regardless of family needs, business requirements, or emergencies. Numerous items of common personal property—cameras, radio sets, and firearms—were declared to constitute "contraband," and were subjected to summary seizure. Any plaintiff who changed his or her place of residence was required to notify defendant of the address of his or her new residence. Defendant further notified plaintiffs that they were to be excluded from the West Coast and encouraged them to abandon their residences "voluntarily" and move to the inland states, where they were purportedly to be "resettled." *Personal Justice Denied*, pp. 100-1.

63. On March 18, 1942, the War Relocation Authority was established pursuant to Executive Order 9102, 7 Fed. Reg. 2165, to administer defendant's program of so-called "relocation" of the plaintiff class from the West Coast, but the War Department retained direct control over decisions affecting curfew, exclusion, imprisonment, and other restrictions imposed on the plaintiff class.

64. The Congress promptly enacted Public Law No. 503, 56 Stat. 173, authorizing the arrest, fine, and imprisonment of anyone found violating any military order issued pursuant to EO 9066, without any consideration of the lack of factual justification for the military's orders, or the civil rights of plaintiffs.

65. Contrary to its previous suggestions that plaintiffs voluntarily leave the West Coast, on or about March 27, 1942, defendant abruptly prohibited any further departures by plaintiffs from the West Coast, and announced and began the implementation of its scheme of forcible exclusion of all persons of Japanese ancestry from the



West Coast states of California, Oregon, Washington, and Arizona, pursuant to the aforescribed conspiracies to violate plaintiffs' constitutional rights.

66. Defendant expelled plaintiffs from their homes and communities on very short notice, sometimes as short as 48 hours, without providing plaintiffs any information as to where they were being sent or for how long they would be gone. Defendant misrepresented to plaintiffs that adequate housing, employment, and essential services would be available to them in their new residences. Defendant further compelled plaintiffs to leave their homes with only the clothing, personal, and household necessities that they could carry in their hands. A copy of a typical Civilian Exclusion Order, directing plaintiffs' expulsion, is attached hereto as Exhibit I.

67. Pursuant to its malicious conspiracy to deprive plaintiffs of their rights, defendant forced plaintiffs to seek sale, storage, or management of their property within a period of a few days or weeks, causing substantial or complete loss of plaintiffs' property in most cases. Defendant further misrepresented that it would assist plaintiffs in protecting their property, but then failed to provide adequate management, sales, insurance, or storage services, and warned plaintiffs that any property placed in defendant's custody would be stored "at the sole risk of the owner." Commercial warehouses and insurance companies refused to provide protection for plaintiffs' property, forcing plaintiffs either to abandon their property or sell it at sacrifice prices. Defendant has failed to provide full or fair compensation for plaintiffs' devastating losses of property, caused directly by the events alleged herein. *Personal Justice Denied*, pp. 108-112, 117-133.

68. After driving plaintiffs from their homes, defendant failed to protect plaintiffs' property from known and foreseeable looting, vandalism, and waste, resulting in the destruction and loss of virtually all of plaintiffs' property. Defendant further failed to maintain or pro-

tect plaintiffs' valuable agricultural land, or to protect or harvest plaintiffs' crops, in violation of its express promises to plaintiffs. Defendant's wrongful acts caused the loss of valuable crops and income, the reversion of valuable farm-land to barren waste land, and the forfeiture of land and lease rights due to plaintiffs' inability to continue mortgage, tax, and lease payments subsequent to their expulsion and imprisonment. Defendant's failure to protect plaintiffs' property breached duties of reasonable care owed to plaintiffs by defendant, breached implied and express promises by defendant to protect plaintiffs and their property during these actions, and violated plaintiffs' statutory, constitutional, and common law rights.

69. Using military troops with drawn guns and bayonets, defendant forced plaintiffs from their homes onto crowded buses, trucks, and railroad cars, and took them to prison camps surrounded by barbed wire, sentry towers, and armed guards. Defendant subjected plaintiffs to threats and acts of physical violence, arrest, fine, and imprisonment for any noncompliance with the orders excluding plaintiffs from their homes and confining them to prison camps.

70. Defendant made only rare exceptions from the exclusion orders; even the sick, disabled, and hospitalized were arrested and imprisoned. Orphanages and mental and medical institutions were raided, with defendant demanding custody of anyone with even the slightest Japanese ancestry. Proof of longstanding loyalty to the United States was ignored; decorated veterans of the U.S. armed forces and leaders of American civic organizations were arbitrarily arrested and imprisoned solely because of their Japanese ancestry. Over 70,000 of these Americans were women, children, elderly and disabled persons against whom the defendant did not even attempt to advance claims that they had any access or ability to carry out illicit activities. Further, approximately 72,000 of those imprisoned were United States citizens, second and third generation Americans due the full rights of citizenship.

71. On August 7, 1942, defendant announced its successful completion of the forcible arrest and imprisonment of all United States citizens and residents of Japanese ancestry from the West Coast.

72. Defendant also conceived, planned, and attempted to implement an unlawful scheme whereby more than 100,000 additional Americans of Japanese ancestry living in the Hawaiian Islands were to be arrested and deported to the leper colony on the island of Molokai or to detention centers on the mainland. The United States, however, was forced to alter that plan due only to the lack of transport ships and the Islands' dependence on the labor of these persons. Nevertheless, over 1500 members of the plaintiff class were arrested without charges and incarcerated in detention camps on Hawaii, located at Sand Island and at Honolulu. Approximately 1900 plaintiffs, mostly United States citizens and their families, were deported to the mainland, many due solely to defendant's allegation that they were unproductive and undesirable. *Personal Justice Denied*, pp. 268-277. Defendant promised these plaintiffs freedom and employment opportunities on the mainland, and forced them to sign papers waiving any right to sue the United States. However, in violation of its promise, defendant thereafter transferred these plaintiffs directly into prison camps on the mainland, where most of them were incarcerated for the duration of the war.

73. In furtherance of defendant's conspiracy as alleged herein, defendant deliberately and maliciously disguised the true illegal nature of its actions against plaintiffs by use of euphemisms and distorted propaganda. Defendant referred to the plaintiff class as "enemy aliens" and "non-aliens," rather than as "permanent residents" and "United States citizens". The process of forcing plaintiffs from their homes into military custody was called "evacuation," "relocation," or "controlled migration," suggesting voluntary measures taken for plaintiffs' own protection. The areas from which plaintiffs were ex-

cluded on account of their race were called "military areas" or "military reservations," although these areas were nothing more than political jurisdictions where anti-Japanese racism was most rampant—covering the entire states of California, Washington, Oregon, and parts of Arizona. The temporary prison camps into which plaintiffs were herded at gunpoint, and housed in animal stalls and other inhumane housing, were called "assembly centers," and described by defendant as "a convenient gathering point . . . where evacuees live temporarily while awaiting the opportunity for orderly planned movement." The barren, inhumane camps in which plaintiffs were imprisoned by armed guards behind barbed wire for periods averaging three years, were publicly referred to by defendant as "relocation centers" and "pioneer communities," although defendant privately acknowledged in inter-office memoranda and correspondence that these were in fact "concentration camps." Through strict use of these euphemisms, prohibitions on photographs of the camps, and other propaganda, defendant fraudulently concealed the illegal nature of its actions.

74. As an integral part of the 1942 exile of plaintiffs from their homes, defendant first forced most members of the plaintiff class into so-called "assembly centers," which were makeshift prison camps on the West Coast, pending construction of more permanent prison camps for them deep in the interior of the country. The Commission reports the following data on the locations, dates of operation, and maximum population of these temporary prison camps:

Location of Camp	Dates of Operation (1942)	Maximum Population
Fresno, CA	May 6 to October 30	5,120
Manzanar, CA	March 21 to June 2	9,837
Marysville, CA	May 8 the [sic] June 29	2,451



Mayer, AZ	May 7 to June 2	245
Merced, CA	May 6 to September 15	4,508
Pinedale, CA	May 7 to July 23	4,792
Pomona, CA	May 7 to August 24	5,434
Portland, OR	May 2 to September 10	3,676
Puyallap, WA	April 28 to September 12	7,390
Sacramento, CA	May 6 to June 26	4,739
Salinas, CA	April 27 to July 4	3,586
Santa Anita, CA	March 27 to October 27	18,719
Stockton, CA	May 10 to October 17	4,271
Tanforan, CA	April 28 to October 13	7,816
Tulare, CA	April 20 to September 4	4,978
Turlock, CA	April 30 to August 12	3,661

*Personal Justice Denied*, p. 138

75. These temporary prison camps consisted of hastily converted race tracks, fairgrounds, and livestock stables, surrounded by armed guards, where plaintiffs were forced to live in horse stalls, tarpaper shacks, and other facilities unfit for human habitation. There, plaintiffs were subject to overcrowding, poor sanitation, inadequate food, shortage of medical staffing and supplies, and epidemics of food poisoning, tuberculosis, pneumonia, and other diseases, resulting in plaintiffs' death, severe physical injuries, and emotional distress. *Personal Justice Denied*, pp. 135-144.

76. By late 1942, defendant had completed construction of ten permanent prison camps euphemistically referred to by defendant as "relocation centers." Defendant subsequently drove plaintiffs straight from their homes or from the temporary prison camps onto crowded trains bound for the permanent prison camps. Defendant reported the following data on the locations, dates of operation, and maximum populations of the prison camps:

Location	Dates of Operation	Maximum Population
Central Utah, UT ("Topaz")	Oct. 1942 - Oct. 1945	8,300
Colorado River, AZ ("Poston")	June 1942 - Nov. 1945	18,000
Gila River, AZ	Aug. 1942 - Nov. 1945	13,400
Granada, CO	Sept. 1942 - Oct. 1945	7,600
Heart Mountain, WY	Sept. 1942 - Nov. 1945	11,100
Manzanar, CA	June 1941 - Nov. 1945	10,200
Minidoka, CA	Sept. 1942 - Oct. 1945	9,990
Tule Lake, CA	June 1942 - March 1946	18,800
Jerome, AR	Nov. 1942 - June 1944	8,600
Rohwer, AR	Oct. 1942 - Nov. 1945	8,500

U.S. Department of Interior, "The Evacuated People: A Quantitative Description", 1946, p. 18. Defendant also

maintained illegal high security incarceration facilities for an unknown number of plaintiffs at so-called "Citizen Isolation Camps" in Moab, Utah and Leupp, Arizona, and at a "stockade" at Tule Lake.

77. These permanent prison camps were situated in uninhabited desert and swamp areas, where plaintiffs were housed in tarpaper barracks and surrounded by barbed wire fencing, armed guards, and sentry towers with searchlights and machine guns or other weaponry aimed toward plaintiffs. Armed military patrols were frequently sent into some of the prison camps to threaten plaintiffs and repress any potential resistance or complaints by plaintiffs concerning conditions in the camps.

78. Plaintiffs lived in daily fear for their lives in the camps, not knowing when or if they would ever be released, or whether they and their families would survive the physical and emotional trauma imposed on them by defendant. Members of the plaintiff class died or were hospitalized as a result of inhumane conditions and inadequate care in the camps and others were senselessly shot or beaten by defendant's agents, causing death, severe injury, and continuing trauma to plaintiffs. *Personal Justice Denied*, pp. 149-165; 177-180.

79. In the camps, plaintiffs were provided inadequate hygienic and medical supplies, and were subjected to extreme weather conditions, ranging from 120°F to -40°F, without adequate protection from these extreme conditions, causing death, physical injury, and severe emotional distress to members of the plaintiff class. The quality and quantity of food provided to plaintiffs were inadequate and fell below the standards required for prisoners of war by international convention, causing sickness and hardships to plaintiffs. Education offered in the camps was inferior and failed to meet the minimum requirements mandated by state law. The housing construction was designed according to specifications to be used only for temporary housing of seasoned combat units, and was grossly inadequate for the prolonged in-

carceration of civilians, especially the young, the elderly, the ill, and the disabled.

80. Plaintiffs were subjected to extreme deprivations of liberty and privacy in the camps. Plaintiffs were removed from American society and forbidden as a class to leave the camps or return to their homes for almost 3 years. During these long years, members of the plaintiff class were forced to live in small rooms with eight to twelve persons including strangers as well as family. Plaintiffs were denied all privacy and autonomy in their personal and family affairs, causing family disintegration and destruction of plans for family life and education. Defendant denied plaintiffs any knowledge or control of their destiny, and instead subjected them to indefinite imprisonment and inhumane treatment. These conditions caused plaintiffs severe emotional and physical distress, resulting in numerous suicides, disabilities, and death.

81. While in the camps, plaintiffs were restricted from discussing current political topics, including internal United States politics, the progress of the war, plaintiffs' treatment by defendant, legal rights, means of redress or resistance to United States actions, and other "controversial" subjects. Plaintiffs who made statements critical of the United States or of their loss of liberty were subjected to harsh punitive measures by defendant, including beatings and indefinite solitary confinement. Group meetings were prohibited unless they were restricted to permissible topics and were conducted in English. Further, plaintiffs were required to give advance notice of group meetings to camp officials, so that a camp official could be present to record all statements made.

82. Defendant maliciously intercepted, censored, and seized many of plaintiffs' letters, packages and publications entering or leaving the prison camp. These actions denied plaintiffs information necessary to the exercise of their constitutional rights, and prohibited them from disseminating information pertaining to the mass injustices herein described.



83. Plaintiffs were restricted in their religious practices and beliefs by the afore-described restrictions on group meetings, on written materials, and on permissible topics for discussion, and were further inhibited in their religious freedom in the camps by numerous punitive measures taken by defendant against followers of Eastern religious beliefs.

84. Defendant deliberately placed the camps in barren areas and exploited plaintiffs' labor. Plaintiffs were forced to work in the camps and in labor crews for the United States' war effort, contrary to standards set by international conventions, and were forced to work to provide necessities for themselves, their families, and the other residents of the camps. Plaintiffs were provided no compensation or grossly inadequate compensation for their labor. When plaintiffs were paid for their work, their wages were \$12, \$16, or \$19 per month—substantially less than weekly wages paid for the same work by persons not of Japanese descent. This forced labor caused plaintiffs to suffer severe losses of income and liberty.

85. While in the camps, Plaintiffs were subjected to warrantless searches and seizures of their persons and property, interrogation, and other forms of duress by defendant. Persons acting as informants within the camps reported derogatory and false information about plaintiffs, often resulting in defendant's arbitrary punishment of plaintiffs on the basis of these unsubstantiated reports. These actions caused deep fears and distrust among members of the plaintiff class.

86. Defendant deliberately and capriciously denied release from the camps for many admittedly loyal plaintiffs who had asked to leave and who were cleared for release by the FBI, solely because of alleged "unfavorable community sentiment" toward persons of Japanese ancestry. By its acts, omissions, policies, and regulations, defendant denied plaintiffs' release for reasons not re-

lated to any legitimate government interest, in violation of plaintiffs' fundamental constitutional rights.

87. Senior officials in the War Department expressly admitted in confidential communications dated as early as April 8, 1943, that there was no military justification for the continued imprisonment of the plaintiff class, and that the only reasons for continuation of plaintiffs' imprisonment were political and social, *i.e.*, invidious racial discrimination against persons of Japanese ancestry. Despite these private admissions, defendant continued to represent publicly that military interests necessitated the continued imprisonment of the plaintiff class until the end of the war. Even when the then-Commanding General of the Western Defense Command urged rescission of the exclusion and imprisonment orders, and insisted that there was no military justification for their continuation, defendant intentionally delayed rescission of the mass exclusion orders until December 1944, for the sole purpose of facilitating the President's re-election in November 1944. *Personal Justice Denied*, p. 15.

88. Defendant subjected plaintiffs to "loyalty questionnaires" under extremely stressful and threatening conditions. Plaintiffs were required to state whether they would served [*sic*] on combat duty, wherever ordered, for the United States; and whether they would swear unqualified to the United States and "forswear" any form of allegiance or obedience to the Japanese Emperor. These confrontations caused plaintiffs great anxiety, confusion, and stress, due to the unlawful actions defendant had taken thus far against them, and defendant's threats and authority to take further punitive measures against plaintiffs. The non-citizen permanent resident members of the plaintiffs class were caused extreme anxiety by the questionnaires, which in effect asked them to renounce the only citizenship they had and were permitted to hold, while at the same time defendant continued to treat them as "enemy aliens" subject to arbitrary de-

portation, and to deny them any citizenship or liberty rights as Americans.

89. Many plaintiffs gave qualified answers to these questionnaires, or questioned the legality of defendant's actions against them, or sought their reinstatement of rights before being subjected to combat service. These persons were subjected to numerous punitive measures including assault, battery, and prolonged imprisonment. Many were designated as "disloyal," and transferred to the prison camp at Tule Lake, California for "segregation." By October 1943, about 15,000 plaintiffs, including families and children of those whom defendant deemed to be "troublesome" or "disloyal," were transferred to the Tule Lake camp for segregation. These plaintiffs were subjected to particularly harsh treatment and prolonged incarceration, were stigmatized as disloyal, were classified as "undesirable aliens" by the Selective Service System, and were subjected to threats and actual losses of citizenship, and deportation.

90. Beginning in January 1943, defendant maliciously subjected plaintiffs in the camps to selective service recruitment, and subsequently to forcible conscription, primarily in racially segregated combat units facing extraordinary battlefield casualties. Defendant imposed harsh punishments on those who refused to serve, including criminal convictions and lengthy prison terms. Despite their arbitrary and unlawful incarceration by the United States, Americans of Japanese ancestry volunteered for military service for the United States at much higher rates than any other group, including Caucasians. Plaintiffs rendered outstanding performance with the 442nd Regimental Combat Team (RCT) in Europe, and in military intelligence in the Pacific. The 442nd RCT, an all-Japanese-American combat unit, suffered the highest casualty rate—three hundred and eighteen (318) percent versus twenty-five (25) percent average—of any U.S. military unit during World War II, and was the single most highly decorated military unit during the

entire war. The Japanese-Americans who served in military intelligence in the Pacific were credited with shortening the war against Japan by two years. Despite plaintiffs' exemplary performance in these combat units, defendant continued its mass imprisonment orders against plaintiffs.

91. In furtherance of the racially-motivated conspiracy against the plaintiff class herein described, defendant in 1944 drafted and gained passage of special legislation, Public Law 405, 58 Stat. 677, permitting persons in time of war to "renounce" their U.S. citizenship by affirmative statements. This legislation was implemented against plaintiffs under circumstances of undue influence, duress, coercion, and the severe constitutional deprivations imposed on plaintiffs in the camps. The legislation resulted in the "revocation" of United States citizenship for approximately 5,589 plaintiffs, so-called "renunciants," most of whom were within the segregated population at Tule Lake prison camp. Over 1,100 of these persons were promptly deported by defendant to Japan for "repatriation." Over 4,000 of these "renunciants" attempted, with only mixed success, to have their "renunciations" invalidated as being procured by fraud and duress.

92. Defendant further subjected certain plaintiffs to forcible deportation and involuntary "repatriation" to Japan, and to repeated threats of such deportation, while plaintiffs were detained in U.S. custody. Pursuant to Presidential Proclamation 2655, 10 Fed. Reg. 8947, issued July 14, 1945, forcible deportation was authorized for all "alien enemies . . . deemed dangerous to the public peace and safety of the United States." In all, defendant deported over 4,700 plaintiffs to Japan from Tule Lake and Department Justice [*sic*] internment camps, without proper hearings or opportunity for any defense by plaintiffs, and without any demonstration by defendant of the "dangerous" nature of these person.

93. Recently declassified documents demonstrate that the defendant affirmatively misrepresented and sup-



pressed evidence in its control which attested to plaintiffs' loyalty. Defendant intentionally and capriciously raised false claims in briefs filed in the United States Supreme Court, as well as in lower federal courts, for the purpose of shielding its illegal acts from judicial scrutiny, and denying plaintiffs access to a fair trial and to any form of fair judicial redress for the injuries inflicted on them.

94. In *Hirabayashi v. United States*, the first case challenging the United States' actions to be heard by the Supreme Court, the Director of the Department of Justice's Alien Enemy Control Unit expressly warned the Solicitor General of the United States on April 30, 1943, of the falsity of the government's claims of military necessity for the mass imprisonment of plaintiffs, and further articulated the responsibility of the Department of Justice to bring the true facts to the Court's attention.

Thus, in one of the crucial points of the case, the Government is forced to argue that individual, selective evacuation would have been impractical and insufficient when we have positive knowledge that the only Intelligence agency responsible for advising Gen. DeWitt gave him advice directly to the contrary.

In view of this fact, I think we should consider very carefully whether we do not have a duty to advise the Court of the existence of the Ringle memorandum and of the fact that this represents the view of the Office of Naval Intelligence. It occurs to me that any other course of conduct might approximate the suppression of evidence.

See Memorandum from Edward J. Ennis to Solicitor General Fahy, dated April 30, 1943, attached hereto as Exhibit J.

95. Defendant, in bad faith, excluded from the record of pending court actions the evidence contradicting the so-called "military necessity" for mass imprisonment of

plaintiffs, and instead made false representations that disclosure of this evidence would jeopardize national security interests, and that "judicial notice" should be taken of the alleged justification for defendant's improper actions against plaintiffs.

96. Defendant was fully aware that its claims of military necessity were in direct contradiction to the afore-described authoritative intelligence reports and other evidence in its control, and that there was no substantive evidence in support of its claims of a military necessity for plaintiffs' imprisonment. For example, an April 12, 1944 memorandum from the Assistant Director of the Department of Justice Alien Enemy Control Unit to Attorney General Biddle pointed out General DeWitt's knowledge of the falsity of his claims of espionage and sabotage by plaintiffs:

The letter of April 4 (1944) from Chairman Fly of the Federal Communication Commission . . . suggests not only that many of the facts recited by General DeWitt as justifying the evacuation were incorrect, but that General DeWitt knew them to be false.

See Exhibit K.

97. In furtherance of defendant's conspiracy to deprive plaintiffs' rights on the basis of their race, defendant unethically subjected key attorneys in the Department of Justice (hereinafter "DOJ") to duress and coercion in a concerted effort to have them misrepresent, suppress, and cover up evidence in DOJ's possession demonstrating plaintiffs' loyalty, and in order to deprive plaintiffs of their right to fair judicial proceedings. Defendant intentionally withheld from DOJ attorneys and the FCC the then-confidential *Final Report*<sup>3</sup> of the War Depart-

<sup>3</sup> *Final Report: Japanese Evacuation from the West Coast—1942*, authored primarily by Col. Bendetsen and Gen. DeWitt, was the War Department's official report on plaintiffs' arrest and imprisonment. Originally issued in April 1943, the *Final Report* and all evidence

ment, which contained numerous misrepresentations which DOJ and the FCC knew were unfounded and untrue. Instead, defendant secretly provided a copy of the *Final Report*, as well as staff assistance, to the State of California in U.S. Supreme Court litigation challenging defendant's actions, in order to present to the Supreme Court patently false claims as to plaintiffs' alleged disloyalty. See September 30, 1944 Memorandum from Edward Ennis, Director of the Alien Enemy Control Unit, to Herbert Wechsler, Assistant General in charge of the War department, attached hereto as Exhibit L.

98. After defendant finally provided DOJ attorneys with limited excerpts torn from the *Final Report*, DOJ attorneys proposed to insert a warning in a footnote in the brief to the Supreme Court of *Korematsu v. United States*, that notified the Court *not* to take judicial notice of the "facts" recited in the *Final Report*, because those "facts" were in contradiction to evidence known to and views held by DOJ. The War Department, in bad faith, objected to the inclusion of this warning, and caused DOJ attorneys to delete the warning to the Supreme Court about the lack of any factual basis for plaintiffs' mass imprisonment by defendant, resulting in an unfair hearing on defendant's illegal actions.

99. As a result of defendant's aforesaid misrepresentations and suppression of evidence, which misrepresentations the Supreme Court relied on in whole, the Supreme Court issued decisions upholding criminal convictions of persons who challenged the mass curfew and exclusion orders. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943); *Korematsu*

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pertaining to its existence were promptly ordered burned by defendant because the military commander's statements therein pertaining to "military necessity" were so racist and indefensible that defendant feared invalidation of its actions in pending court challenges. Defendant subsequently reissued the *Final Report*, after altering the purported military justification for its actions. *Personal Justice Denied*, pp. 222-3.

*v. United States*, 323 U.S. 214 (1944). Defendant subsequently publicized said decisions and other similar decisions adverse to plaintiffs as support for the alleged legal validity of its actions. Until very recently, defendant continued to suppress and cover up the existence of the contrary facts and circumstances indicating the lack of any factual basis for plaintiffs' mass imprisonment and the defendant's actual knowledge of those contrary facts and circumstances, with the intention and purpose of dissuading plaintiffs from asserting judicial claims for redress of the wrongs herein alleged.

100. Defendant pursued a malicious conspiracy of mooting, delaying, and otherwise interfering with legal challenges raised by members of the plaintiff class, in a concerted effort to deprive plaintiffs of their right to a full and fair judicial determination of the legality of defendant's actions against them.

101. As part of defendant's conspiracy to prevent plaintiffs from adjudicating their legal claims against defendant's actions, defendant intentionally sought numerous delays, raised frivolous procedural disputes, claimed in bad faith that plaintiffs failed to exhaust non-existent administrative remedies, removed plaintiffs from the jurisdiction of the courts, and released selected individual litigants from its custody in order to avoid an adjudication of defendant's illegal conduct. In these and numerous other ways, defendant maliciously prohibited plaintiffs from obtaining a fair judicial hearing on the legality of defendant's actions against the plaintiff class.

102. Defendant acted in furtherance of the aforesaid conspiracy by threatening and intimidating plaintiffs from seeking judicial redress, by threatening to suspend the writ of *habeas corpus*, and threatening to revoke plaintiffs' United States citizenship and residency status. Defendant in fact implemented these threats against certain plaintiffs by revoking their United States citizenship, subjecting them to extended years of imprisonment, and deporting them to Japan. Defendant drafted legislation



to revoke plaintiffs' right to *habeas corpus*, but deferred seeking its enactment because defendant succeeded in accomplishing the same purpose by other illicit means; i.e., imprisoning plaintiffs for the duration of the war while preventing them from obtaining judicial relief. A copy of a letter from Col. Bendetsen to Mr. McCloy's staff dated September 13, 1942, forwarding draft legislation intended to suspend the writ of *habeas corpus* for plaintiffs, is attached as Exhibit M.

103. The one *habeas corpus* petition that was finally heard by the Supreme Court was decided on December 18, 1944, after two and one-half years of delays by defendant, during which time defendant had continued mass imprisonment and exclusion orders against members of the plaintiff class. In *Ex parte Endo*, 323 U.S. 283 (1944), the Court held that concededly loyal American citizens, such as the petitioner therein, could not be involuntarily detained by defendant. Nevertheless, defendant had succeeded in imprisoning plaintiffs for most of the duration of the war, and in fact continued its physical custody of thousands of plaintiffs for months after that court decision.

104. Although the aforesaid mass exclusion and imprisonment orders were formally rescinded on January 2, 1945, thousands of plaintiffs continued to be imprisoned or barred from returning to their homes due to arbitrary "individual exclusion orders." These orders were issued by defendant simultaneously with the rescission of the mass exclusion orders, but without hearing, probable cause, or recourse by plaintiffs. Further, defendant continued to imprison and punish persons who had attempted to resist, challenge, or disagree with defendant's actions.

105. Defendant effectively barred many plaintiffs from leaving the prison camps because defendant had confiscated or caused destruction of their homes, vehicles, personal property, and life savings, and then did not provide them with adequate funds for transportation, food, or lodging necessary to leave the isolated camps. Due to

these and other wrongful acts by defendant, over half of the plaintiff class (approximately 55,000 persons) were still in the physical custody of the United States when Japan surrendered in August 1945, over three years after plaintiffs had been imprisoned. The prison camps were not finally closed until March 1946.

106. Defendant never proved a single act of espionage, sabotage, or other disloyal act by any member of the plaintiff class. No actions similar to those described hereinabove were ever taken by defendant against U.S. citizens and residents of German or Italian ancestry during World War II.

107. Defendant's actions as alleged herein were motivated in large part by racial animus and a bad faith intent to deprive plaintiffs of their fundamental civil and constitutional rights solely on the basis of race and national ancestry. Substantial new evidence indicates that defendant's actions were further based on numerous other improper motives, including but not limited to:

(1) Retaliation against Americans of Japanese ancestry for Japan's attack on Pearl Harbor and mistreatment of Americans in its custody;

(2) Psychological studies and experimentation on the "Oriental Mind" for anthropological and military purposes;

(3) Forced labor for U.S. agricultural needs during the labor shortage and war effort; and

(4) Appeasement of political figures who sought to rid the West Coast of Japanese Americans for their own political, social, and economic gain.

108. There is an actual controversy between plaintiffs and the defendant requiring a declaration by this Court that defendant's actions against the plaintiff class described herein were illegal. The injuries inflicted upon the plaintiff class by defendant have never been formally acknowledged, redressed, or otherwise properly compensated by defendant. The continuing purported validity of de-

fendant's discriminatory actions and defendant's failure to eradicate the effects of those actions have caused and are causing continuing injuries to the plaintiff class, including but not limited to persisting stigma, suspicions of disloyalty, chilling effects on plaintiffs' exercise of their constitutional rights, and other injuries as alleged herein. Defendant's actions further create a real and continuing threat of similar future actions against plaintiffs, as well as other racial or ethnic minority groups. For example, at the Commission's hearings on November 3, 1981, former Assistant Secretary of War John J. McCloy testified that mass arrests and imprisonment on the basis of race may justifiably recur in the event of future hostilities with other nations, such as Cuba.

109. Since the time of the unlawful actions herein alleged, defendant has continued its conspiracy and actions to deprive plaintiffs of their constitutional rights and redress, by continuing to perpetuate the force and effects of its misrepresentations and suppression of confidential government documents demonstrating the unlawful and patently racist nature of defendant's actions.

110. Numerous documents attesting to defendant's aforesaid continuing conspiracy to deprive plaintiffs of their constitutional rights and to redress for defendant's actions have been recently retrieved, declassified, and made public only as a result of the 1980 Congressional mandate that the Commission on Wartime Relocation and Internment of Civilians study the causes for the wartime internment of persons of Japanese ancestry. The Commission's Report, *Personal Justice Denied* (dated February 24, 1983), confirms numerous instances in which defendant misrepresented the military necessity for its actions, suppressed authoritative intelligence reports attesting to the loyalty of the plaintiff class, and interfered with judicial processes so as to deny any effective means of redress to the plaintiff class. Attached hereto as Exhibit N is the summary chapter of *Personal Justice Denied* [note: omitted from Joint Appendix].

## CAUSES OF ACTION

111. Plaintiffs incorporate by reference the foregoing allegations of their Amended Complaint, and further allege that:

### I. DUE PROCESS

112. Defendant's actions pursuant to Executive Orders 9066 and 9102, Presidential Proclamation 2525, and other actions and orders of the U.S. government as herein alleged, subjected plaintiffs to summary loss of life, liberty, and property, and to deprivation of their most fundamental constitutional, statutory, common law, and human rights, without individualized hearings or the opportunity to be heard, in violation of the Fifth Amendment's guarantee that individuals shall not be deprived of life, liberty, or property without due process of law.

### II. EQUAL PROTECTION

113. Defendant's actions pursuant to Presidential Proclamation 2525, Executive Orders 9066 and 9102, and other orders and actions of the U.S. government as herein alleged, by their intent and effect, subjected plaintiffs to deprivations of their civil and constitutional rights solely on the basis of race and national ancestry. These actions were not reasonably related to any legitimate governmental interest, and were not the least restrictive means of implementing any legitimate governmental interest in national security. Defendant's actions constituted invidious discrimination in violation of plaintiffs' right to the equal protection of the law, pursuant to the Fifth Amendment of the United States Constitution.

### III. UNJUST TAKING

114. Defendant's actions as herein alleged caused a taking of plaintiffs' private property for public use, in that defendant totally or substantially destroyed plaintiffs' real and personal property, commercial interests,



livelihood, reputation, liberty, and other property rights, privileges, and entitlements secured by federal, state, and local law.

115. Defendant has failed to compensate or has provided grossly inadequate compensation for plaintiffs' losses of property rights, in violation of the Fifth Amendment of the United States Constitution.

#### IV. PROTECTION FROM UNREASONABLE ARREST, SEARCH AND SEIZURE

116. Defendant arrested and imprisoned plaintiffs and searched and seized plaintiffs' property, without probable cause, without issuance of warrants according to law, and without notice of formal charges against plaintiffs, in violation of plaintiffs' right of protection from illegal arrest and unreasonable search and seizure secured by the Fourth Amendment of the United States Constitution.

#### V. PRIVILEGES AND IMMUNITIES

117. Defendant's action as herein alleged denied plaintiffs the fundamental rights, privileges, and immunities of citizens of the other states, solely on the basis of plaintiffs' race and national ancestry, in violation of the Privileges and Immunities Clause of the United States Constitution.

#### VI. RIGHT TO FAIR TRIAL AND REPRESENTATION BY COUNSEL

118. Plaintiffs' arrest, exclusion, and imprisonment, as herein alleged, constituted actual criminal prosecutions, for which defendant denied plaintiffs their rights to a fair trial, notice of any formal charges against them, confrontation of witnesses against them, compulsory process for obtaining witnesses in their favor, assistance of counsel for their defense, and a fair and impartial trial of their guilt or innocence of any wrongdoing, in violation of the Sixth Amendment of the United States Constitution.

#### VII. PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT

119. Defendant's actions as herein alleged caused plaintiffs wanton and unnecessary infliction of pain, were grossly disproportionate to any security risks posed by the plaintiff class and, in light of the absence of the commission of any crime by plaintiffs, violated plaintiffs' protection from cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

#### VIII. FREEDOM OF RELIGION

120. Defendant's actions as herein alleged infringed plaintiffs' right to freedom of religion secured by the First Amendment, in that defendant arrested and punished certain plaintiffs on the basis of Eastern religious beliefs attributed to them, and restricted plaintiffs' exercise of their religious beliefs and practices.

#### IX. FREEDOM OF SPEECH AND PRESS

121. Defendant's actions as herein alleged violated plaintiffs' rights of free speech, expression, and press secured by the First Amendment, in that plaintiffs were punished for any statements critical of the defendant or of their treatment by defendant. Defendant infringed plaintiffs' right to discuss political and other similar topics, restricted plaintiffs' ability to engage in group meetings and to organize for political action, denied plaintiffs access to important written materials, censored plaintiffs' communications, and prohibited plaintiffs from freely speaking and publishing.

#### X. FREEDOM OF ASSOCIATION

122. Defendant's actions as herein alleged infringed on the plaintiffs' rights of association secured by the First Amendment, by isolating plaintiffs from society in remote racially-segregated prison camps, prohibiting plaintiffs'

contact with the rest of American society, severely restricting plaintiffs' right to hold group meetings, to discuss ideas, and to organize for political and cultural purposes, and by subjecting plaintiffs to harsh punitive measures on the basis of their alleged association with various law-abiding cultural, political, and business organizations.

#### XI. FREEDOM OF PETITION FOR REDRESS OF GRIEVANCES

123. Defendant, by its actions herein alleged, denied plaintiffs their right to petition for redress of grievances secured by the First Amendment. Plaintiffs who attempted to present grievances to defendant were beaten, assaulted, threatened, locked in stockade cages, tortured, denied food and clothing, and subjected to other life-threatening conditions. Defendant restricted plaintiffs from discussion or political activity that was critical of defendant's actions against them, and threatened plaintiffs with punitive measures and losses of their constitutional rights and citizenship for criticizing United States' actions against them. Defendant further denied plaintiffs' right to petition for redress of grievances by intentionally interfering with judicial processes, by affirmatively misrepresenting and suppressing evidence in defendant's possession relating to the loyalty of the plaintiff class, and by delaying, mooting, and otherwise preventing or interfering with plaintiffs' attempts to obtain a fair judicial determination of the legality of defendant's actions.

#### XIII. PRIVACY, TRAVEL, AND OTHER CONSTITUTIONAL RIGHTS

124. Defendant's subjection of plaintiffs to prolonged incarceration, degrading treatment, societal ostracism, and invidious racial discrimination caused plaintiffs to suffer egregious losses of their rights to liberty, privacy, autonomy, and interstate travel, in violation of plaintiffs' rights under the United States Constitution.

#### XIII. PROTECTION FROM INVOLUNTARY SERVITUDE

125. Defendant forced plaintiffs to labor in the prison camps without compensation or for grossly inadequate compensation, solely on account of plaintiffs' race and national ancestry, in violation to the Thirteenth Amendment of the United States Constitution.

#### XIV. BILLS OF ATTAINDER AND EX POST FACTO LAWS

126. Defendant's actions against plaintiffs, including Presidential Proclamation 2525, Executive Orders 9066 and 9102, and Public Laws 503 and 405 constituted Bills of Attainder and Ex Post Facto laws against members of the plaintiff class, in violation of Article I, Section 9 of the Constitution of the United States.

#### XV. DENIAL OF HABEAS CORPUS

127. Defendant denied plaintiffs' right to the writ of *habeas corpus*, in violation of Article I, Section 9 of the Constitution, by delaying and mooting cases, suppressing and misrepresenting evidence, threatening and conspiring to withdraw the writ of *habeas corpus* for the plaintiff class, and otherwise interfering with the administration of justice and with the adjudication of the legality of defendant's actions.

#### XVI. CONSPIRACY TO DEPRIVE PLAINTIFFS OF THEIR CIVIL RIGHTS

128. By its aforesaid actions, defendant conspired with its officers, employees, and agents and with state and local officials, and authorized and directed a conspiracy among certain of its own officers, agents, and employees, for the purpose of depriving plaintiffs of their civil rights and the equal protection of the laws on the



basis of their race and national ancestry, in violation of 42 U.S.C. §§ 1981, 1983, and 1985-6.

#### XVII. ASSAULT AND BATTERY

129. Defendant's actions as herein alleged subjected plaintiffs to numerous physical and psychological injuries, fear of imminent bodily harm, and death.

#### XVIII. FALSE ARREST AND FALSE IMPRISONMENT

130. Defendant's forcible arrest, exclusion, and imprisonment of plaintiffs for periods averaging three or more years was without legal authority or colorable legal claim, and constituted false arrest and false imprisonment.

#### XIX. ABUSE OF PROCESS AND MALICIOUS PROSECUTION

131. Defendant, by its aforesaid actions, subjected plaintiffs to malicious prosecution and abuse of process without legal authority and in deliberate disregard of established judicial processes and the legal rights of plaintiffs.

#### XX. NEGLIGENCE

132. Defendant owed plaintiffs a duty of reasonable care in its capacity as custodian of plaintiffs' persons and property because of its actions as herein alleged. Defendant negligently failed to exercise reasonable care to protect plaintiffs' property from loss, destruction, and vandalism during plaintiffs' exclusion and imprisonment. Defendant negligently failed to feed, house, and otherwise care for plaintiffs adequately during their incarceration in the prison camps. Defendant further negligently failed to pursue means within its control for confirming plaintiffs' loyalty and securing plaintiffs' prompt release. These actions caused plaintiffs to suffer death, physical

injuries, prolonged incarceration, emotional distress, losses of property, and other injuries, in the past, in the present, and continuing into the future.

#### XXI. BREACH OF CONTRACT

133. Defendant secured plaintiffs' cooperation in peacefully leaving their homes, businesses, and property, on the basis of defendant's promises: (1) that plaintiffs would be free to relocate to inland communities, and there pursue normal life, work, and schooling; (2) that defendant would protect plaintiffs and their property during relocation; (3) that plaintiffs would be permitted to return to their homes as soon as the alleged temporary military emergency subsided; (4) and that plaintiffs would not be deprived of their constitutional rights. These and other promises constituted express and implied-in-fact contracts between plaintiffs and defendant, based on numerous press releases, public statements, administrative instructions, orders, brochures, and other written and oral statements issued by defendant to plaintiffs, examples of which are attached hereto as Exhibit O (Press release issued by the Federal Reserve Bank of San Francisco, Evacuee Property Department, March 10, 1942), and Exhibit P ("Questions and Answers for Evacuees", a brochure distributed by WRA, circa spring 1942); and Exhibit I (Exclusion Order, ¶ 2). In reliance on said promises, plaintiffs peacefully complied with the actions ordered by defendant. Defendant, however, violated each of these contractual duties by its actions as alleged herein, causing great losses of life, liberty, and property to plaintiffs.

#### XXII. BREACH OF FIDUCIARY DUTY

134. Defendant, by statutes, regulations and orders it promulgated and actions as herein before alleged, established a system of comprehensive and pervasive federal control, management, and supervision of every aspect of plaintiffs' daily lives during the period of detention.

This system of federal management and control was undertaken pursuant to Presidential Proclamation 2525, Executive Orders 9066, 9102, and 9423, orders of military commanders, and rules, regulations, and directives of the War Relocation Authority, Wartime Civil Control Administration, the Departments of War, Justice and Interior, the Federal Reserve Bank, the Farm Security Administration, and other agencies of the Federal Government. Under this system of comprehensive management and control the United States assumed the full responsibility of Guardian or Trustee, and placed the Plaintiffs in the position of Wards or Beneficiaries—totally reliant and dependent on the United States for plaintiffs' every need. Pursuant to the referenced regulations and orders, defendant undertook to provide for plaintiffs' food, health care, housing, and education, and to manage and control all aspects of plaintiffs' behavior, including the exercise of constitutional rights. *See, e.g.*, "Principal Obligations Taken on by WRA", from excerpts of "War Relocation Authority Tentative Policy Statement," attached hereto as Exhibit Q. Defendant thereby assumed fiduciary duties toward plaintiffs.

135. By concealing, suppressing and misrepresenting to plaintiffs, the courts, and the Congress, the lack of military necessity for its actions; by manipulating judicial process to deny plaintiffs timely review of the legality of defendant's actions; by failing to abide by its own undertaking to provide adequate food, housing, health care, education, and other protective services for plaintiffs and their property; and by denying plaintiffs the exercise of their constitutional, statutory, and common law rights as enumerated above (Counts I-XXI), defendant breached its fiduciary duties to plaintiffs and is accountable for damages resulting therefrom.

#### PRAYERS FOR RELIEF

WHEREFORE, named plaintiffs and their class pray for the following relief:

1. That this Court enter an order establishing this action as a class action and permitting named plaintiffs to represent the class described herein.

2. That this Court declare defendant's acts, as herein alleged, to be in violation of plaintiffs' constitutional, statutory, and civil rights, as herein enumerated.

3. That this Court enter judgment against Defendant United States of America for \$10,000 for each cause of action for each plaintiff class member herein as to causes of action not sounding in tort.

4. That this Court enter judgment against Defendant United States of America for compensatory damages for each cause of action herein sounding in tort for each plaintiff class member, in such amount as shall be found by the jury upon trial of this action.

5. That this Court award plaintiffs costs, interest, and attorneys' fees for their prosecution of this action, pursuant to 42 U.S.C. § 1988.

6. That this Court order such other and further relief as it deems just and proper.

LANDIS, COHEN, SINGMAN AND  
RAUH

/s/ Benjamin L. Zelenko  
Benjamin L. Zelenko

/s/ B. Michael Rauh  
B. Michael Rauh

/s/ Ellen Godbey Carson  
Ellen Godbey Carson

Attorneys for Plaintiffs

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(202) 785-2020



## JURY DEMAND

Please take notice that PLAINTIFFS HEREBY DEMAND TRIAL BY JURY OF SIX PERSONS.

LANDIS, COHEN, SINGMAN AND  
RAUH

/s/ Benjamin L. Zelenko  
Benjamin L. Zelenko

/s/ B. Michael Rauh  
B. Michael Rauh

/s/ Ellen Godbey Carson  
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## LIST OF EXHIBITS

## EXHIBIT

- A Memorandum from Secretary of Navy Knox to President Roosevelt, October 9, 1940
- B Memorandum from President Roosevelt to Chief of (Naval) Operations, August 10, 1936
- C Report on "Japanese on the West Coast" by Curtis B. Munson, November 1941
- D Report on the Japanese Question by Lt. Commander Kenneth D. Ringle, U.S. Navy, January 26, 1942

- E Letter from FCC Chairman James L. Fly to Attorney General Francis Biddle, April 4, 1944
- F Transcript of Telephone Conversation between General DeWitt and Assistant Secretary of War McCloy, February 3, 1942
- G Memorandum from General DeWitt to the Secretary of War ("Final Recommendation"), February 14, 1942
- H Executive Order 9066, February 19, 1942
- I Civilian Exclusion Order No. 5, April 1, 1942
- J Memorandum from Edward Ennis (Director, DOJ Alien Enemy Control Unit) to Solicitor General Fahy, April 30, 1943
- K Memorandum from John Burling (Assistant Director, DOJ Alien Enemy Control Unit) to Attorney General Biddle, April 12, 1944
- L Memorandum from Edward Ennis to Herbert Wechsler (Assistant Attorney General in charge of the War Department), September 30, 1944
- M Letter from Col. Karl Bendetsen to Office of the Assistant Secretary of War, September 13, 1942
- N *Personal Justice Denied*, Commission on Wartime Relocation and Internment of Civilians, issued February 24, 1983. Summary chapter (pp. 1-18) [omitted from Joint Appendix]

- O Press Release, issued by Evacuee Property Department, of the Federal Reserve Bank of San Francisco, March 10, 1942
- P War Relocation Authority, *Questions and Answers for Evacuees* (circa 1942)
- Q War Relocation Authority Tentative Policy Statement (excerpts) May 29, 1942

## EXHIBIT A

SECRETARY OF THE NAVY  
Washington

October 9, 1940

## MEMORANDUM FOR THE PRESIDENT

Orders have been issued for these measures to be taken at once:

1. Call the organized Naval and Marine Reserves.
2. Call Fleet Reserve, Navy and Marine, selective basis.
3. Lay nets and booms for drill purposes.

The following steps in preparation for war can be taken to impress the Japanese with the seriousness of our preparations:

1. Army send reinforcement to Hawaii if contemplated.
2. Presidential proclamation for Maritime Commission to requisition merchant ships, in order to
3. Take over tankers, transports, auxiliaries, and begin to assemble Train on West Coast.
4. Coast Guard transfer to Navy.
5. Fill up garrisons of defense battalions in 14th District outlying bases.
6. Presidential proclamation establishing defensive sea areas.
7. Withdraw nationals from China. (Inconsistent with getting merchant ships out of danger).
8. Plan for evacuation of families out of Hawaii and later Panama.
9. Preparations regarding seizure German and Japanese merchant vessels in ports and near our coasts.



10. Pressure on Britain to speed leases Bermuda and Newfoundland (essential).

11. Change laws to take limit off naval and marine personnel—limit to President's discretion.

12. Prepare plans for concentration camps (Army-Justice).

13. Executive Order to call Volunteer Reserves, including communication and merchant marine reserves.

14. Withdraw Marines from North China (this means Embassy should be closed). Leave very small token force. Stop sending replacements, Marines Shanghai—let attrition operate. Consider withdrawal when currency situation permits.

15. Netherlands East Indies: —Assist in material; line up for mutual support.

The following are matters for Treasury and State:

1. Freeze credits and assets of Japan.
2. Continue to bolster Chinese credit.
3. Take such steps as may be necessary to insure Chinese currency carrying on in case Shanghai is occupied by Japan.

For consideration, but in abeyance for the moment:

1. Alert the Asiatic Station at once to get ships other than river gunboats out of China. This should be the first secret step.

2. Alert the Naval Establishment (Establish security patrols, etc.)

Military Establishment  
Merchant Marine (Clippers)  
Department of Justice—sabotage—Surveillance of agents  
Panama Canal—all security measures.

# EXHIBIT B

THE WHITE HOUSE  
Washington

August 10, 1936.

## MEMORANDUM FOR

### THE CHIEF OF OPERATIONS

In regard to enclosed memorandum of June thirtieth:

1. Has the local Joint Planning Committee (Hawaii) any recommendation to make?

2. One obvious thought occurs to me—that every Japanese citizen or non-citizen on the Island of Oahu who meets these Japanese ships or has any connection with their officers or men should be secretly but definitely identified and his or her name placed on a special list of those who would be the first to be placed in a concentration camp in the event of trouble.

3. As I told you verbally today, I think a Joint Board should consider and adopt plans relating to the Japanese population of all the Islands. Decision should be made as to whether the Island of Hawaii could or should be defended against landing parties. From my personal observation I should say off-hand that it would be extraordinarily difficult, as the Island is quite far from Oahu. The chief objective should be to prevent its occupation as a base of operations against Oahu and other islands. Its mere occupation, without the possibility of making it a base, would accomplish little for an enemy. As I remember it, there is only one small harbor—large enough perhaps for a few destroyers and submarines—and that other anchorages are merely open roadsteads.

Please let me have further recommendations after studies have been made.

F.D.R.

## EXHIBIT C

## JAPANESE ON THE WEST COAST

(C. B. Munson)

. . . (Excerpts; introductory discussion deleted)

## WHAT WILL THE JAPANESE DO

## SABOTAGE

Now that we have roughly given a background and a description of the Japanese elements in the United States the question naturally arises—what will these people do in case of a war between the United States and Japan? As interview after interview piled up, those bringing in results began to call it the same old tune. Such it was with only minor differences. These contacts ranged all the way from two-day sessions with Intelligence Services, through business men, to Roman Catholic priests who were frankly not interested in the United States and were only interested in making as many Catholics as possible. The story was all the same. There is no Japanese 'problem' on the Coast. There will be no armed uprising of Japanese. There will undoubtedly be some sabotage financed by Japan and executed largely by imported agents or agents already imported. There will be the odd case of fanatical sabotage by some Japanese 'crackpot'. In each Naval District there are about 250 to 300 suspects under surveillance. It is easy to get on the suspect list, merely a speech in favor of Japn [*sic*] at some banquet, being sufficient to land one there. The Intelligence Services are generous with the title of suspect and are taking no chances. Privately, they believe that only 50 or 60 in each district can be classed as really dangerous. The Japanese are hampered as saboteurs because of their easily recognized physical appearance.

It will be hard for them to get near anything to blow up if it is guarded. There is far more danger from Communists and people of the Bridges type on the Coast than there is from Japanese. The Japanese here is almost exclusively a farmer, a fisherman or a small business man. He has no entree to plants or intricate machinery.

## ESPIONAGE

The Japanese, if undisturbed and disloyal, should be well equipped for obvious physical espionage. A great part of this work was probably completed and forwarded to Tokio years ago, such as soundings and photography of every inch of the Coast. They are probably familiar with the location of every building and garage including Mike O'Flarety's out-house in the Siskiyou with all trails leading thereto. An experienced Captain in Navy Intelligence, who has from time to time and over a period of years intercepted information Tokio bound, said he would certainly hate to be a Japanese coordinator of information in Tokio. He stated that the mass of useless information was unbelievable. This would be fine for a fifth column in Belgium or Holland with the German army ready to march in over the border, but though the local Japanese could spare a man who intimately knew the country for each Japanese invasion squad, there would at least have to be a terrific American Naval disaster before his brown brothers would need his services. The dangerous part of their espionage is that they would be very effective as far as movement of supplies, movement of troops and movement of ships out of harbor mouths and over railroads is concerned. They occupy only rarely positions where they can get to confidential papers or in plants. They are usually, when rarely so placed, a subject of perpetual watch and suspicion by their fellow workers. They would have to buy most of this type of information from white people.



## PROPAGANDA

Their direct propaganda is poor and rather ineffective on the whole. Their indirect is more successful. By indirect we mean propaganda preaching the beauties of Japan and the sweet innocence of the Japanese race to susceptible Americans.

## SUMMARY

Japan will commit some sabotage largely depending on imported Japanese as they are afraid of and do not trust the Nesei [sic]. There will be no wholehearted response from Japanese in the United States. They may get some helpers from certain Kibei. They will be in a position to pick up information on troop, supply and ship movements from local Japanese.

For the most part the local Japanese are loyal to the United States or, at worst, hope that by remaining quiet they can avoid concentration camps or irresponsible mobs. We do not believe that they would be at least any more disloyal than any other racial group in the United States with whom we went to war. Those being here are on a spot and they *know it*. This is a hurried, preliminary report as our boat sails soon for Honolulu. We have not had a moment even to sort out our voluminous material since we came west. Your reporter is very satisfied he has told you what to expect from the local Japanese, but is horrified to note that dams, bridges, harbors, power stations, etc. are wholly unguarded everywhere. The harbor of San Pedro could be razed by fire completely by four men with hand grenades and a little study in one night. Dams could be blown and half of lower California might actually die of thirst, not to mention the damage to the food supply. One railway bridge at the exit from the mountains in some cases could tie up three or four main railroads. The Navy has to crawl around San Pedro on its marrow bones from oil company to oil company, from lumber yard to harbor board, to city fathers,

to politicians in lieu of a centralized authority, in order to strive albeit only partially to protect the conglomeration of oil tanks, lumber, gas tanks and heaven knows what else. And this is the second greatest port in the United States! This is the home base of at least the South Pacific Fleet! This is the greatest collection of inflammable material we have ever seen in our lifetime concentrated in a small vulnerable area! We do not suspect the local Japanese above anyone else or as much as the Communists or the Nazis, but before or on the outbreak of war in the South Pacific someone will set fire to this. If they do not they are fools. The Navy or some unified authority should have complete control of the harbor of Los Angeles, known as San Pedro and Long Beach, from the water's edge in a twenty-five mile radius inland, before the outbreak of war with Japan. That time is now.

We will re-work this report for final submittal later. We have missed a great deal through haste. We believe we have given the high points to the best of our ability. The Japanese are loyal on the whole, but we are wide open to sabotage on this Coast and as far inland as the mountains, and while this one fact goes unrectified I cannot unqualifiedly state that there is no danger from the Japanese living in the United States which otherwise I would be willing to state.

/s/ Curtis B. Munson

## EXHIBIT D

BRANCH INTELLIGENCE OFFICE  
ELEVENTH NAVAL DISTRICT  
Fifth Floor, Van Nuys Building  
Seventh and Spring Streets  
Los Angeles, California

BIO/ND11/EF37/A8-5  
Serial LA/1055/re

[26 Jan. 1942]

From: Lieutenant Commander K. D. RINGLE,  
USN.

To: The Chief of Naval Operations.

Via: The Commandant, Eleventh Naval District.

Subject: Japanese Question, Report on.

Reference: (a) OpNav ltr file (SC) A8-5/EF37 Op-16-  
B-7/RB A89-5/EF37 Serial No.  
01742316 of 12/30/41.

(b) Reports of Mr. C. B. Munson, Special  
Representative of the State Department,  
on Japanese on the West Coast, dated  
Nov. 7, 1941, and Dec. 20, 1941.

(c) NHI 119 Report, file BIO/ND11/EF37/  
A8-2, serial LA/861 of 3/27/41, subject-  
NISEI.

(d) NHI 119 Report, file BIO/ND11/EF37/  
A8-2, serial LA/5223 of 11/4/41, sub-  
ject-NISEI.

(e) NHI 119 Report, file BIO-LA/ND11/  
EF37/P8-2, serial LA/6524 of 12/12/  
41, subject-HEIRUSHA-KAI.

(f) NHI 119 Report, file BIO-LA/ND11/  
EF37/P8-2, serial LA/417 of 1/5/42,  
subject-NIEI Organizations and Activi-  
ties.

(g) Dept. of Commerce Bulletin, Series P-3,  
Number 23; dated 12/9/41.

Enclosure: (A) Transcripts of J. B. Hughes' broadcasts  
of Jan. 5, 6, 7, 9, 15, 19, and 20, 1942.

(B) F.B.I., L.A. Report re Japanese Activi-  
ties, Los Angeles, dated Jan. 20, 1942.

1. In accordance with paragraph 2 of reference (a),  
the following views and opinions with supporting facts  
and statements are submitted.

## I OPINIONS.

The following opinions, amplified in succeeding para-  
graphs, are held by the writer:

(a) That within the last eight or ten years the entire  
"Japanese question" in the United States has reversed  
itself. The alien menace is no longer paramount, and is  
becoming of less importance almost daily, as the original  
alien immigrants grow older and die, and as more and  
more of their American-born children reach maturity.  
The primary present and future problem is that of deal-  
ing with these American-born United States citizens of  
Japanese ancestry, of whom it is considered that least  
seventy-five per cent are loyal to the United States. The  
ratio of these American citizens of Japanese ancestry to  
alien-born Japanese in the United States is at present  
almost 3 to 1, and rapidly increasing.

(b) That of the Japanese-born alien residents, the  
large majority are at least passively loyal to the United  
States. That is, they would knowingly do nothing what-  
ever to the injury of the United States, but at the same  
time would not do anything to the injury of Japan. Also,



most of the remainder would not engage in active sabotage or insurrection, but might well do surreptitious observation work for Japanese interests if given a convenient opportunity.

(c) That, however, there are among the Japanese both alien and United States citizens, certain individuals, either deliberately placed by the Japanese government or actuated by a fanatical loyalty to that country, who would act as saboteurs or agents. This number is estimated to be less than three per cent of the total, or about 3500 in the entire United States.

(d) That of the persons mentioned in (c) above, the most dangerous are either already in custodial detention or are members of such organizations as the Black Dragon Society, the Kaigun Kyokai (Navy League), or the Heirusa Nai (Military Service Men's League), or affiliated groups. The membership of these groups is already fairly well known to the Naval Intelligence service or the Federal Bureau of Investigation and should immediately be placed in custodial detention, irrespective of whether they are alien or citizen. (See references (c) and (f).)

(e) That, as a basic policy tending toward the permanent solution of this problem, the American citizens of Japanese ancestry should be officially encouraged in their efforts toward loyalty and acceptance as bona fide citizens; that they be accorded a place in the national effort through such agencies as the Red Cross, U.S.O., civilian defense, and even such activities as ship and aircraft building or other defense production activities, even though subject to greater investigative checks as to background and loyalty, etc., than Caucasian Americans.

(f) That in spite of paragraph (e) above, the most potentially dangerous element of all are those American citizens of Japanese ancestry who have spent the formative years of their lives, from 10 to 20, in Japan and have returned to the United States to claim their legal American citizenship within the last few years. These people are essentially and inherently Japanese and may

have been deliberately sent back to the United States by the Japanese government to act as agents. In spite of their legal citizenship and the protection afforded them by the Bill of Rights, they should be looked upon as enemy aliens and many of them placed in custodial detention. This group numbers between 600 and 700 in the Los Angeles metropolitan area and at least that many in other parts of Southern California.

(g) That the writer heartily agrees with the reports submitted by Mr. Munson (reference (b) of this report.)

(h) That, in short, the entire "Japanese Problem" has been magnified out of its true proportion, largely because of the physical characteristics of the people; that it is no more serious than the problems of the German, Italian, and Communistic portions of the United States population, and, finally that it should be handled on the basis of the *individual*, regardless of citizenship, and *not* on a racial basis.

(i) That the above opinions are and will continue to be true just so long as these people, Issei and Nisei, are given an opportunity to be self-supporting, but that if conditions continue in the trend they appear to be taking as of this date; i.e., loss of employment and income due to anti-Japanese agitation by and among Caucasian Americans, continued personal attacks by Filipinos and other racial groups, denial of relief funds to desperately needy cases, cancellation of licenses for markets, produce houses, stores, etc., by California State authorities, discharges from jobs by the wholesale, unnecessarily harsh restrictions on travel, including discriminatory regulations against Nisei preventing them from engaging in commercial fishing—there will most certainly be outbreaks of sabotage, riots, and other civil strife in the not too distant future.

## II BACKGROUND.

(1) In order that the qualifications of the writer to express the above opinions may be clearly understood, his background of acquaintance with this problem is set forth.

(a) Three years' study of the Japanese language and the Japanese people as a naval language student attached to the United States Embassy in Tokyo from 1926 to 1931.

(b) One year's duty as Assistant District Intelligence Officer, Fourteenth Naval District (Hawaii) from July 1936 to July 1937.

(c) Duty as Assistant District Intelligence Officer, Eleventh Naval District, in charge of Naval Intelligence matters in Los Angeles and vicinity from July 1940 to the present time.

(2) As a result of the above, the writer has over the last several years developed a very great interest in the problem of the Japanese in America, particularly with regard to the future position of the United States citizen of Japanese ancestry, and has sought contact with certain of their leaders. He has likewise discussed the matter widely with many Caucasian Americans who have lived with the problem for years. As a result, the writer believes firmly that the only ultimate solution is as outlined in paragraphs I(e) and I(h) above; namely, to deliberately and officially encourage the American citizen of Japanese ancestry in his efforts to be a loyal citizen and to help him to be so accepted by the general public.

### III ELABORATION OF OPINIONS EXPRESSED IN PARAGRAPH I.

(1) For purposes of brevity and clearness, four Japanese words in common use by Americans as well as Japanese in referring to these people will be explained. Hereafter these words will be used where appropriate.

ISSEI (pronounced ee-say) meaning "first generation." Used to refer to those who were born in Japan; hence, alien Japanese in the United States.

NISEI (pronounced nee-say) meaning "second generation." Used for those children of ISSEI born in the United States.

SANSEI (pronounced sän-say) meaning "third generation." Children of NISEI.

KIBEI (pronounced kee-bay) meaning "returned to America." Refers to those NISEI who spent all or a large portion of their lives in Japan and who have now returned to the United States.

(2) The one statement in paragraph I(a) above which appears to need elaboration is that seventy-five per cent or more of the Nisei are loyal United States citizens. This point was explained at some length in references (c) and (d). The opinion was formed largely through personal contact with the Nisei themselves and their chief organization, the Japanese American Citizens League. It was also formed through interviews with many people in government circles, law-enforcement officers, business man, etc., who have dealt with them over a period of many years. There are several conclusive proofs of this statement which can be advanced. These are—

(a) The action taken by the Japanese American Citizens League in convention in Santa Ana, California, on January 11, 1942. This convention voted to require the following oath to be taken, signed, and notarized by every member of that organization as a prerequisite for membership for the year 1942, and for all members taken into the organization in the future:

"I, \_\_\_\_\_, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I hereby renounce any other allegiances which I may have knowingly or unknowingly held in the past; and that I take this obligation freely without any mental reservation or purpose of evasion. So help me God."

(b) Many of the Nisei leaders have voluntarily contributed valuable anti-subversive information to this and other governmental agencies. (See reference (d) and enclosure (B).)

(c) That the Japanese Consular staff, leaders of the Central Japanese Association, and others who are known



to have been sympathetic to the Japanese cause do not themselves trust the Nisei.

(d) That a very great many of the Nisei have taken legal steps through the Japanese Consulate and the Government of Japan to officially divest themselves of Japanese citizenship (dual citizenship), even though by so doing they become legally dead in the eyes of the Japanese law, and are no longer eligible to inherit any property which they or their family may have held in Japan. This opinion is further amplified in references (c) and (d).

(3) The opinion expressed in paragraph I(b) above is based on the following: The last Issei who legally entered the United States did so in 1924. Most of them arrived before that time; therefore, these people have been in the United States at least eighteen years, or most of their adult life. They have their businesses and livelihoods here. Most of them are aliens only because the laws of the United States do not permit them to become naturalized. They have raised their children, the Nisei mentioned in paragraph (1) above, in the United States; many of them have sons in the United States army. Exact figures are not available, but the local Military Intelligence office estimates that approximately five thousand Nisei in the State of California have entered the United States army as a result of the Selective Service Act. It does not seem reasonable that these aliens under the above conditions would form an organized group for armed insurrection or organized sabotage. Insofar as numbers go, there are only 48,697 alien Japanese in the eight western states.

The following paragraph quoted from an Associated Press despatch from Washington referring to the registration of enemy aliens is considered most significant on this point: "The group which must register first comprises the 135,843 enemy aliens in the western command—Arizona, California, Idaho, Montana, Nevada, Oregon, Utah, and Washington. The group includes 26,255 Germans, 60,905 Italians, and 48,697 Japanese."

It is assumed that the foregoing figures are based either on the 1940 census or the alien registration which was taken the latter part of 1940.

There are two factors which must be considered in this group of aliens: First, the group includes a sizeable number of "technical" aliens; that is, those who, although Japanese born and therefore legally aliens, entered the United States in infancy, grew up here, and are at heart American citizens. Second, the parents of the Kibei, mentioned in paragraph I(f), should be considered as those who are most loyal to Japan, since they themselves are the ones who sent their children to be educated and brought up entirely in the Japanese manner.

(4) Paragraph I(c) needs no further elaboration.

(5) Paragraph I(d) has been elaborated at length in references (c) and (f).

(6) Elaboration of paragraph I(c). The United States recognizes these American-born Orientals as citizens, extends the franchise to them, drafts them for military service, forces them to pay taxes, perform jury duty, etc., and extends to them the complete protection afforded by the Constitution and Bill of Rights, and yet at the same time has viewed them with considerable suspicion and distrust, and so far as it is known to the writer, has made no particular effort to develop their loyalty to the United States, other than to permit them to attend public schools. They are segregated as to where they may live by zoning laws, discriminated against in employment and wages, and rebuffed in nearly all their efforts to prove their loyalty to the United States, yet at the same time those of them who grow to about the age of 16 years in the United States and then go to Japan for a few years of education find themselves viewed with more suspicion and distrust in that country than they ever were in the United States, and the majority of them return after a short time thoroughly disillusioned with Japan and more than ever loyal to the United States.

It is submitted that the only practical permanent solution of this problem is to indoctrinate and absorb these people, accept them as an integral part of the United States population, even though they remain a racial minority, and officially extend to them the rights and privileges of citizenship, as well as demanding of them the duties and obligations.

Furthermore, if some such steps are not taken, the field for proselyting [*sic*] and propaganda among them is left entirely to Japanese interests acting through Consulates, Consular agents, so-called "cultural societies", athletic clubs, Buddhist and Shinto priests—who through a quirk in the United States immigration laws may and have entered the country freely, regardless of exclusion laws or quota as "ministers of religion"—trade treaty aliens, steamship and travel agencies, "goodwill" missions, etc. It is well known to the writer that his acquaintance with and encouragement of Nisei leaders in their efforts towards Americanization was a matter of considerable concern to the former Japanese Consul at Los Angeles.

It is submitted that the Nisei could be accorded a place in the national war effort without risk or danger, and that such a step would go farther than anything else towards cementing their loyalty to the United States. Because of their physical characteristics they would be most easily observed, far easier than doubtful citizens of the Caucasian race, such as naturalized Germans, Italians, or native-born Communists. They would, of course, be subject to the same or more stringent checks as to background than the Caucasians before they were employed.

(7) No elaboration is considered necessary for paragraph I(f), I(g), and I(h).

(8) Elaboration of paragraph I(i). The opinion outlined in this paragraph is considered most serious and most urgent. There already exists a great deal of economic distress due to such war conditions as frozen credits and accounts, loss of employment, closing of

businesses, restrictions on travel, etc. This condition is growing worse daily as the savings of most of the alien-dominated families are being used up. As an example, the following census, taken by missionary interests, of alien families in the fishing village on Terminal Island is submitted:

"How long can you maintain your family without work?"

Immediate attention .....	9 families
1 month .....	52 families
2 months .....	64 families
3 months .....	81 families
4 months .....	32 families
5 months .....	20 families
6 to 10 months .....	129 families
Over 10 months .....	90 families

Total ..... 477 families.

Large numbers of people, both Issei and Nisei, are idle now, and their number is growing. Children are beginning to be unable to attend school through lack of food and clothing. There have been already incipient riots brought about by unprovoked attacks by Filipinos on persons of the Japanese race, regardless of citizenship. There is a great deal of indiscriminate anti-Japanese agitation stirring the white population by such people as Lail Kano, former Naval Reserve officer, James Young, Hearst correspondent, in his series of lectures, and John B. Hughes, radio commentator, transcripts of whose broadcasts are submitted as enclosure (A).

There are just enough half truths in these articles and statements to render them exceedingly dangerous and to arouse a tremendous amount of violent anti-Japanese feeling among Caucasians of all classes who are not thoroughly informed as to the situation. It is noted that in these broadcasts, lectures, etc., there are no distinc-



tions made whatever between the actual members of the Japanese military forces in Japan and the second and third generation citizens of Japanese ancestry born and brought up in the United States. It must also be remembered that many of the persons and groups agitating anti-Japanese sentiment against the Issei and Nisei have done so for some time for ulterior motives—notable is the anti-Japanese agitation by the Jugo-Slav fishermen who frankly desire to eliminate competition in the fishing industry.

It is further noted that according to the local press, Congressman Leland K. Ford has introduced a bill in Congress providing for the removal and internment in concentration camps of all citizens and residents of Japanese extraction, which according to the census figures would amount to about 127,000 people of all ages and sexes in the continental United States, plus an additional 158,000 in Hawaii and other territories and possessions, *excluding* the Philippines, (see reference (g) for population breakdown). It is submitted that such a proposition is not only unwarranted but very unwise, since it would undoubtedly alienate the loyalty of many thousands of persons who would otherwise be entirely loyal to the United States, would add this extra burden of supporting and guarding these people to the war effort, would disrupt many essential businesses, notably that of the growing and supplying of foodstuffs, and would probably cause a widespread outbreak of sabotage and riot.

#### IV RECOMMENDATIONS.

(1) Based on the above opinions, the following recommendations for the handling of this situation are submitted:

(a) Provide some means whereby potentially dangerous United States citizens may be held in custodial detention as well as aliens. It is submitted that in a military "theater of operations"—which at present includes all the

West coast—this might be done by review of individual cases by boards composed of members of Military Intelligence, Naval Intelligence, and the Department of Justice.

(b) Under the provisions of (a) above, hold in custodial detention such United States citizens as dangerous Kibei or German, Italian, or other subversive sympathizers and agitators as are deemed dangerous to the internal security of the United States.

(c) Similar procedure to be followed in cases of aliens—not only Japanese, but other aliens of whatever nationality, whether so-called "friendly" aliens or not. This suggestion is made since it is believed that there exist other aliens—Spanish, Mexican, Portuguese, Slavonian, French, who are active Axis sympathizers.

(d) Other suggestions as listed in reference (a).

(e) In the cases of persons held in custodial detention, whether alien or citizen, see that some definite provision is made for the support of their dependent families. This could be done by:

(1) Releasing certain specified amounts from these peoples' "frozen" funds monthly for the support of these dependents.

(2) Making definite provisions through relief funds for support of such dependents, so that they will not become either public charity or embittered against the United States, and themselves dangerous to the internal peace and security of the country.

(f) In the interest of national unity and internal peace and security some measures should be instituted to restrain agitators of both races and press who are attempting to arouse sentiment and bring about action—private, local, state, and national, official and unofficial, against these people on the basis of race alone, completely neglecting background, training and citizenship.

K. D. RINGLE.

Copy to:  
DIO(2)

## EXHIBIT E

FEDERAL COMMUNICATIONS COMMISSION  
Washington 25, D. C.

[Apr. 4, 1944]

Honorable Francis Biddle  
Attorney General  
Washington, D. C.

My dear Mr. Attorney General

This is in reply to your letter of February 26, 1944 with reference to Lieutenant General John L. DeWitt's Final Report on Japanese Evacuation from the West Coast, which was recently made public by the War Department.

You state that you are interested in the accuracy of General DeWitt's account, in the first two chapters of the Report, of the events leading to his decision that military necessity required the evacuation, and you note that prevention of signaling by persons, presumably of Japanese descent, on shore to enemy surface vessels or submarines off the coast apparently was a very considerable part of the problem with which General DeWitt was concerned during the period between December 1941 and July 1, 1942, when the evacuation was substantially complete. You direct attention particularly to his reference to hundreds of reports of such signaling by means of signal lights and unlawful radio transmitters and state that investigation by the Department of Justice of great numbers of rumors concerning signal lights and radio transmitters proved them, without exception, to be baseless.

You inquire, first, whether during the period from December 1941 to July 1, 1942, the Commission was engaged on the West Coast in monitoring and identifying signals reported to be from unlawful transmitters and in locating any such transmitters; and, if so, the num-

ber of reports received by the Commission during this period of unlawful or unidentified signals, with a detailed break-down of the results of its investigations:

Throughout this period on the West Coast as elsewhere throughout the United States and its territories, the Commission's Radio Intelligence Division was engaged in a comprehensive 24-hour surveillance of the entire radio spectrum to guard against any unlawful radio activity.

Within the area on the West Coast from which the Japanese were subsequently evacuated, the Commission's Radio Intelligence Division had in operation two Primary Monitoring Stations, located at Portland, Oregon, and San Pedro, California, and nine Secondary Monitoring Stations, located at Seattle, Washington; Portland, Oregon; Arcata, California; Larkspur, California; Fresno, California; Los Angeles, California; San Diego, California; Yuma, Arizona, and Tucson, Arizona. During the period here involved, the Secondary Station at Larkspur, California, was moved to San Leandro, California, and was expanded to a Primary Monitoring Station; and the Secondary Station at Yuma, Arizona, was moved to Salinas, California. The Commission had additional stations at other places within the Western Defense Command.

At all stations, there were special receivers and recorders for intercepting and recording signals throughout the entire radio spectrum. The Primary Monitoring Stations were equipped with extensive antenna arrays and Adcock high-frequency direction-finding apparatus for taking bearings upon sky-wave signals received from all over the world. They were tied in with other Primary Monitoring Stations on the continent as well as in Alaska, Hawaii and Puerto Rico, which together constituted a nation-wide direction-finding system for immediate coordinated action in taking bearings upon and establishing the fix of any suspected transmitter and for exchanging other information relative to identity of radio stations. At the Secondary Monitoring Stations were mobile units,



equipped with loop direction finders, for going into the field and quickly locating an unidentified transmitter by taking bearings within its ground-wave range. Other devices enabled investigators to determine the exact house or even room in which a transmitter was located.

Soon after December 7, 1941, at the request of General DeWitt, the monitoring facilities described above were supplemented by patrols of mobile direction-finding intercept units along the West Coast from Canada to Mexico. These patrols were instituted for the particular purpose of detecting any radio transmissions from shore to ships off the coast.

In the early months of the war, the Commission's field offices and stations on the West Coast were deluged with calls, particularly from the Army and Navy, reporting suspicious radio signaling and requesting the identification of radio signals. In hundreds upon hundreds of cases, identification of the signal was made by Radio Intelligence Division personnel merely by listening to it right at the monitoring station. In no case was the transmission other than legitimate.

In the case of 760 reports of unidentified or unlawful radio signals within the evacuated area during the period in question, which could not be heard or identified by listening at the monitoring station, a field investigation was conducted by mobile direction-finding units. In 641 of the cases it was found that no radio signaling at all was involved. Of the 119 cases remaining, 116 were found to involve lawful transmissions by the following stations:

United States Army Stations .....	21
United States Navy Stations .....	8
Local Police Stations .....	12
United States and Foreign Commercial Licensed Stations .....	65
Japanese Stations in Japanese Territory .....	10

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116

The final 3 were found to involve the very short-range transmissions of the ordinary commercial type phonograph oscillator used in playing recordings for home amusement.

There were no radio signals reported to the Commission which could not be identified, or which were unlawful. Like the Department of Justice, the Commission knows of no evidence of any illicit radio signaling in this area during the period in question.

You also ask the extent to which General DeWitt or his subordinates were informed of the operations of the Commission's Radio Intelligence Division. The General and his staff were kept continuously informed of the Commission's work, both through occasional conferences and day-to-day liaison. In the earlier part of the war, there was constant contact by telephone between Radio Intelligence Division stations and Army and Navy posts along the West Coast for the purpose of furnishing these agencies with bearings and other information pertaining to radio signals. And as the result of a request of General DeWitt in January 1942, the Commission established a Radio Intelligence Center in San Francisco for coordinating radio intelligence information collected by the Army, Navy and the Commission. This Center was tied in by teletypewriter circuit with the Primary Monitoring Stations on the West Coast, as well as with other Primary Stations on the Continent through headquarters in Washington. As a result, it was an integral part of the Commission's nation-wide direction-finding system described above. As a part of the plan for coordinating activities, Army and Navy personnel maintained a liaison attendance at this Center. Both these services, moreover, had a direct telephone circuit from the Center to their headquarters.

You direct attention, further, to the statement in General DeWitt's Report that following the evacuation, interception of suspicious or unidentified radio signals and shore-

to-ship signal lights was virtually eliminated. You state it was the experience of the Department of Justice that, although no unlawful radio signaling or any unlawful shore-to-ship signaling with lights was discovered, a great number of reports of such activity were received, and that these did not diminish in number following the evacuation. It is likewise the Commission's experience that reports of unlawful radio signaling along the West Coast—which in each case were unfounded—were not affected by the evacuation. In fact, throughout the year 1942, the number of reports of unlawful radio operation requiring investigation by mobile units which were received in the States along the West Coast varied in close parallel with the number of such reports received throughout the whole country.

Finally, you refer to General DeWitt's memorandum of January 5, 1942 to James H. Rowe, Jr., Assistant to the Attorney General, set out in the Report, in which concern is expressed over the action to be taken in a case where there should be strong evidence of shore-to-submarine radio communication, but the unlawful radio transmitter could not be located within an area more precise than a city block, or even a general area such as Monterey County. You note that the memorandum suggested that available means were inadequate to locate and seize any such radio transmitter, but state that if your understanding that equipment was available for locating such a transmitter is correct, the problem with which General DeWitt was concerned would not arise in practice. Your understanding is correct. As noted above, equipment developed by the Commission's engineers was on and after December 7, 1941 in the hands of its personnel on the West Coast, which enabled them easily to locate the individual house and even the exact room containing a concealed transmitter.

Pursuant to your request for any other information we may have bearing on the accuracy of the statements in

the Report indicating the existence of illicit radio signaling along the West Coast, additional facts are set forth in the enclosed memorandum.

Sincerely

/s/ JAMES LAWRENCE FLY  
Chairman



## EXHIBIT F

Feb. 3, 1942.  
2 o'clock  
General DeWitt and  
Mr. McCloy.

... (Excerpts of telephone conversation of February 3, 1942).

Mr. McCloy: I have no doubt that if the thing were properly organized there could be a big voluntary mass movement, but there would be bound to be cases, I should think, where some of them would not move, and in that case we would be up against the question as to whether we could move the American citizen of Japanese race. We have felt here that there are so many complications involved in a compulsory movement of any great size that would involve the I think you call them, that is to say the Japanese Americans, that the best way to solve it, at least for the time being, would be to establish limited restricted zones around the airplane plants, the forts and the other important military installations, but do that merely on a military basis, and when you've done it on that basis, establish a system of licensing whereby you permit to come back into that area all non-suspected citizens. You may, by that process, eliminate all of the Japs, but you might conceivably permit some to come back whom you are quite certain are free from any suspicion, as well as the fact that you might let some Italians come back. Now that has sound legal basis for it.

Gen. DeWitt: Particularly about the Germans and the Italians because you don't have to worry about them as a group. You have to worry about them purely as certain individuals. Out here, Mr. Secretary, a Jap is a Jap to these people now.

Mr. McCloy: Yes, I can understand that.

Gen. DeWitt: The Governor said yesterday, I sat on the sidelines, the Governor said yesterday that if something isn't done and done very promptly, why in certain sections of the state they're going to take it into their own hands.

Mr. McCloy: Yes, that's what we fear.

Gen. DeWitt: And that's what we want to avoid.

Mr. McCloy: Yes, we want to allay that information, and I think it will be largely allayed if we can agree upon a substantial statement which the Department of Justice and the War Department can put out, and if we get the support of the press and the public opinion forming institutions of the state.

Gen. DeWitt: I'm going to dictate a redraft of press release. I read it to Mr. Clark from the Department of Justice, who agrees with it and he thinks it's been improved and made a little more accurate. I was now going to read it to Major Bendetsen or General Gullion over the phone and then mail it so it could be gotten to the press.

Mr. McCloy: Yes. Well, you don't need that now because it's been recorded.

Gen. DeWitt: Well I haven't read that—I don't know that I've read the press release—yes I did, I read it.

Mr. McCloy: I thought you read that. You told us the changes that were to be made and I think you specified by quotation marks the changes that were to be made.

Gen. DeWitt: That is correct.

Mr. McCloy: So that I think we've got it all down on record now.

Gen. DeWitt: I think I read the whole thing.

Mr. McCloy: I think so. The purpose of this call . . .

Gen. DeWitt: There are some things I wanted to tell you about the Japanese. I think in view of the very energetic steps that are now being taken, that I just referred to, that nothing can be done until, nothing further rather, until they have thoroughly explored the prospects of doing that successfully. It's the idea of the state authori-

ties, and it's their idea only. If it can be done, it certainly is going to remove the pressure on the military. I'm furnishing just 23,000 guards from the troops that ought to be gotten back to training, and if that can be done, and they can be moved successfully to land, productive land, from that area, it is going to be extremely helpful to me and I'm perfectly willing to accept it as a measure of protection, but if they are allowed to remain where they are, we are just going to have one complication after another, because you just can't tell one Jap from another. They all look the same. Give a sentry or an officer or troops any job like that, a Jap's a Jap, and you can't blame the man for stopping all of them.

Mr. McCloy: I can understand. It's a very difficult problem. That was the point. We didn't want to quote it either here or out there that the War Department had taken a definite position in favor of a mass withdrawal for fear that it might stimulate action if the mass withdrawal did not immediately ensue, and there were so many complications in that that required study that we knew it couldn't immediately ensue, and it might cause them to take the law into their own hands and cause us a great deal of difficulty.

Gen. DeWitt: Well, I have never made any such statements, and if I have been reported as having made such statements, it's—I've kept out of the picture, kept out of the — have been matters that involved military questions.

Mr. McCloy: Yes. Now let me get one more thought clear. If these fellows do not proceed apace with this new suggestion of theirs, I wonder whether it wouldn't be practicable to put into effect a withdrawal from these limited restricted zones, a withdrawal which would include not only Japanese aliens but also Japanese citizens on the basis of excluding from a military reservation any one that you wanted to.

Gen. DeWitt: Since the announcement of the restricted areas, those aliens now in them are beginning to move out.

Those are the aliens but I am talking to you about the citizens as well. The Japanese American citizens.

General DeWitt: They are not touched by this you see.

Mr. McCloy: They wouldn't be touched by what is going on now?

General DeWitt: No.

Mr. McCloy: As I understand it, you are only removing the aliens from those restricted areas.

General DeWitt: That is all, that is all under the restricted areas as designated by the Attorney General is applicable only to enemy aliens.

Mr. McCloy: That is right. Now, my suggestion is that (after we have talked it over with General Gullion and Major Bendetson) we might call those military reservations in substance, and exclude everyone—whites, yellows, blacks, greens—from that area and then license back into the area those whom we felt there was no danger to be expected from.

General DeWitt: Oh I see.

Mr. McCloy: You see, then we cover ourselves with the legal situation is taken care of in that way because in spite of the constitution you can eliminate from any military reservation, or any place that is declared to be in substance a military reservation, anyone—any American citizen, and we could exclude everyone and then by a system of permits and licenses permitting those to come back into that area who were necessary to enable that area to function as a living community. Everyone but the Japs—

General DeWitt: I could think about that but because it has certain ramifications, you take for example the Embarcadero, just whether that—if you had to define that as a military reservation, and then notify everybody in it—there are a tremendous lot of business establish-



ments all along that area that would be licensed. It would be quite a job.

Mr. McCloy: It would be a big administrative job but I think you might cut corners, you might announce the same day that you declare it to be a reservation, you announce it the same moment that everyone is excluded from it but everybody in this category can come in, and in due course they will get a permit as soon as they can get around to it, giving them the right to come in. In the meantime the Japs would have to be out of there, or any other dangerous alien, and now we would eliminate in that way anybody that we wanted to. Now, you can do that on a military reservation without suspending writs of Habeas Corpus and without getting into very important legal complications, and that is a consideration that you might bear in mind and you might be able to do that effectively in respect of all of your really vital localities. You couldn't do it on a very large scale but you could do it on a substantial scale around we will say the Boeing Plant, the Consolidated Plant or some of your ports or your harbor installations.

General DeWitt: That is of course the restricted areas as defined are all considered vital and essential.

Mr. McCloy: We had those, I saw those; there were about 88 of them as I understand it.

General DeWitt: You would have to pick out the most vital of that group.

Mr. McCloy: Now you might take a look at those again in the light of this suggestion which I am now making, and mind you, I put this suggestion up as a possibility pending the determination by the State authorities out there as to whether they think the volunteer plan feasible.

General DeWitt: Yes, all right. We will do that Mr. Secretary but it will take about 10 days before they can arrive at any conclusion with reference to the proposition.

Mr. McCloy: But as I understand it, in the mean-

while this press release, as you have amended it, could be given out and should be given out.

General DeWitt: But I would suggest this, due to the difficulty that I have had with this recording machine, look it over carefully—You have got to speak in the same tone and speed all the time and when it was given to me by General Gullion, I have had it repeated twice over the phone and I didn't get it until I got one that the Department of Justice sent out to Mr. Clark.

Mr. McCloy: We will check it very carefully. Thank you very much. How are you—are you all right.

General DeWitt: Just fine.

Mr. McCloy: You must be pretty busy out there.

General DeWitt: (Laughter) Goodbye.

(Transcribed by Helen Noble Feb. 3, 1942.)

## EXHIBIT G

Final Recommendation of the Commanding General,  
Western Defense Command and Fourth Army,  
Submitted to The Secretary of War

(see page 1 of this Chapter III)

HEADQUARTERS WESTERN DEFENSE COMMAND  
AND FOURTH ARMY  
Presidio of San Francisco, California  
Office of the Commanding General

February 14, 1942

014.31 (DCS)

MEMORANDUM FOR: The Secretary of War,  
(Thru: The Commanding General,  
Field Forces, Washington, D.C.)

SUBJECT: Evacuation of Japanese and other Subver-  
sive Persons from the Pacific Coast.

1. In presenting a recommendation for the evacuation of Japanese and other subversive persons from the Pacific Coast, the following facts have been considered:

a. Mission of the Western Defense Command and Fourth Army.

(1) Defense of the Pacific Coast of the Western Defense Command, as extended, against attacks by sea, land or air;

(2) Local protection of establishments and communications vital to the National Defense for which adequate defense cannot be provided by local civilian authorities.

b. Brief Estimate of the Situation.

(1) Any estimate of the situation indicates that the following are possible and probable enemy activities:

- (a) Naval attack on shipping in coastal waters;
- (b) Naval attack on coastal cities and vital installations;
- (c) Air raids on vital installations, particularly within two hundred miles of the coast;
- (d) Sabotage of vital installations throughout the Western Defense Command.

Hostile Naval and air raids will be assisted by enemy agents signaling from the coastline and the vicinity thereof; and by supplying and otherwise assisting enemy vessels and by sabotage.

Sabotage, (for example, of airplane factories), may be effected not only by destruction within plants and establishments, but by destroying power, light, water, sewer and other utility and other facilities in the immediate vicinity thereof or at a distance. Serious damage or destruction in congested areas may readily be caused by incendiarism.

(2) The area lying to the west of the Cascade and Sierra Nevada Mountains in Washington, Oregon and California, is highly critical not only because the lines of communication and supply to the Pacific theater pass through it, but also because of the vital industrial production therein, particularly aircraft. In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized", the racial strains are undiluted. To conclude otherwise is to expect that children born of white parents on Japanese soil sever all racial affinity and become loyal Japanese subjects, ready to fight and, if necessary, to die for Japan in a war against the nation of their parents. That Japan is allied with Germany and Italy in this struggle is no ground for assuming that any Japanese, barred from assimilation by convention as he is, though born and raised in the United States, will not turn against this nation when the final test of loyalty comes. It, therefore, follows



that along the vital Pacific Coast over 112,000 potential enemies' of Japanese extraction, are at large today. There are indications that these are organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.

c. Disposition of the Japanese.

(1) *Washington*. As the term is used herein, the word "Japanese" includes alien Japanese and American citizens of Japanese ancestry. In the State of Washington the Japanese population, aggregating over 14,500, is disposed largely in the area lying west of the Cascade Mountains and south of an east-west line passing through Bellingham, Washington, about 70 miles north of Seattle and some 15 miles south of the Canadian border. The largest concentration of Japanese is in the area, the axis of which is along the line Seattle, Tacoma, Olympia, Willapa Bay and the mouth of the Columbia River, with the heaviest concentration in the agricultural valleys between Seattle and Tacoma, viz., the Green River and the Puyallup Valleys. The Boeing Aircraft factory is in the Green River Valley. The lines of communication and supply including power and water which feed this vital industrial installation, radiate from this plant for many miles through areas heavily populated by Japanese. Large numbers of Japanese also operate vegetable markets along the Seattle and Tacoma water fronts, in Bremerton, near the Bremerton Navy Yard, and inhabit islands in Puget Sound opposite vital naval ship building installations. Still others are engaged in fishing along the southwest Washington Pacific Coast and along the Columbia River. Many of these Japanese are within easy reach of the forests of Washington State, the stock piles of seasoning lumber and the many sawmills of southwest Washington. During the dry season these forests, mills and stock piles are easily fired. (See inclosed map.)

(2) *Oregon*. There are approximately 4,000 Japanese in the State of Oregon, of which the substantial majority reside in the area in the vicinity of Portland along the south bank of the Columbia River, following the general line Bonneville, Oregon City, Astoria, Tillamook. Many of these are in the northern reaches of the Willamette Valley and are engaged in agricultural and fishing pursuits. Others operate vegetable markets in the Portland metropolitan area and still others reside along the northern Oregon sea coast. Their disposition is in intimate relationship with the northwest Oregon sawmills and lumber industry, near and around the vital electric power development at Bonneville and the pulp and paper installations at Camas (on the Washington State side of the Columbia River) and Oregon City, directly south of Portland). (See inclosed map.)

(3) *California*. The Japanese population in California aggregates approximately 93,500 people. Its disposition is so widespread and so well known that little would be gained by setting it forth in detail here. They live in great numbers along the coastal strip, in and around San Francisco and the Bay Area, the Salinas Valley, Los Angeles and San Diego. Their truck farms are contiguous to the vital aircraft industry concentration in and around Los Angeles. They live in large numbers in and about San Francisco, now a vast staging area for the war in the Pacific, a point at which the nation's lines of communication and supply converge. Inland they are disposed in the Sacramento, San Joaquin and Imperial Valleys. They are engaged in the production of approximately 38% of the vegetable produce of California. Many of them are engaged in the distribution of such produce in and along the water fronts at San Francisco and Los Angeles. Of the 93,500 in California, about 25,000 reside inland in the mentioned valleys where they are largely engaged in vegetable production cited above, and 54,600 reside along the coastal strip, that is to say, a strip of coast line varying from eight miles in the north to twenty miles in width in and around

the San Francisco bay area, including San Francisco, in Los Angeles and its environs, and in San Diego. Approximately 13,900 are dispersed throughout the remaining portion of the state. In Los Angeles City the disposition of vital aircraft industrial plants covers the entire city. Large numbers of Japanese live and operate markets and truck farms adjacent to or near these installations. (See inclosed map.)

d. Disposition of Other Subversive Persons.

Disposed within the vital coastal strip already mentioned are large numbers of Italians and Germans, foreign and native born, among whom are many individuals who constitute an actual or potential menace to the safety of the nation.

2. Action recommended.

a. Recommendations for the designation of prohibited areas, described as "Category A" areas in California, Oregon and Washington, from which are to be excluded by order of the Attorney General all alien enemies, have gone forward from this headquarters to the Attorney General through the Provost Marshal General and the Secretary of War. These recommendations were made in order to aid the Attorney General in the implementation of the Presidential Proclamations of December 7 and 8, 1941, imposing responsibility on him for the control of alien enemies as such. These recommendations were for the exclusion of all alien enemies from Category "A." The Attorney General has adopted these recommendations in part, and has the balance under consideration. Similarly, recommendations were made by this headquarters, and adopted by the Attorney General, for the designation of certain areas as Category "B" areas, within which alien enemies may be permitted on pass or permit.

b. I now recommend the following:

(1) That the Secretary of War procure from the President direction and authority to designate military

areas in the combat zone of the Western Theater of Operations, (if necessary to include the entire combat zone), from which, in his discretion, he may exclude all Japanese, all alien enemies, and all other persons suspected for any reason by the administering military authorities of being actual or potential saboteurs, espionage agents, or fifth columnists. Such executive order should empower the Secretary of War to requisition the services of any and all other agencies of the Federal Government, with express direction to such agencies to respond to such requisition, and further empowering the Secretary of War to use any and all federal facilities and equipment, including Civilian Conservation Corps Camps, and to accept the use of State facilities for the purpose of providing shelter and equipment for evacuees. Such executive order to provide further for the administration of military areas for the purposes of this plan by appropriate military authorities acting with the requisitioned assistance of the other federal agencies and the cooperation of State and local agencies. The executive order should provide further that by reason of military necessity the right of all persons, whether citizens or aliens, to reside, enter, cross or be within any military areas shall be subject to revocation and shall exist on a pass and permit basis at the discretion of the Secretary of War and implemented by the necessary legislation imposing penalties for violation.

(2) That, pursuant to such executive order, there be designated as military areas all areas in Washington, Oregon and California, recommended by me to date for designation by the Attorney General as Category "A" areas and such additional areas as it may be found necessary to designate hereafter.

(3) That the Secretary of War provide for the exclusion from such military areas, in his discretion, of the following classes of persons, viz:

(a) Japanese aliens.

(b) Japanese-American citizens.



(c) Alien enemies other than Japanese aliens.

(d) Any and all other persons who are suspected for any reason by the administering military authorities to be actual or potential saboteurs, espionage agents, fifth columnists, or subversive persons.

(4) That the evacuation of classes (a), (b) and (c) from such military areas be initiated on a designated evacuation day and carried to completion as rapidly as practicable.

That prior to evacuation day all plans be complete for the establishment of initial concentration points, reception centers, registration, rationing, guarding, transportation to internment points, and the selection and establishment of internment facilities in the Sixth, Seventh, and Eighth Corps Areas.

That persons in class (a) and (c) above be evacuated and interned at such selected places of internment, under guard.

That persons in class (b) above, at the time of evacuation, be offered an opportunity to accept voluntary internment, under guard, at the place of internment above mentioned.

That persons in class (b) who decline to accept voluntary internment, be excluded from all military areas, and left to their own resources, or, in the alternative, be encouraged to accept resettlement outside of such military areas with such assistance as the State governments concerned or the Federal Security Agency may be by that time prepared to offer.

That the evacuation of persons in class (d) be progressive and continuing, and that upon their evacuation persons in class (d) be excluded from all military areas and left in their own resources outside of such military areas, or, in the alternative, be offered voluntary internment or encouraged to accept voluntary resettlement as above outlined, unless the facts in a particular case shall warrant other action.

(5) The Commanding General, Western Defense Command and Fourth Army, to be responsible for the evacuation, administration, supply and guard, to the place of internment; the Commanding Generals of the Corps Areas concerned to be responsible for guard, supply and administration at the places of internment.

(6) That direct communication between the Commanding General, Western Defense Command and Fourth Army and the Corps Area Commanders concerned for the purpose of making necessary arrangements be authorized.

(7) That the Provost Marshal General coordinate all phases of the plan between the Commanding General, Western Defense Command and Fourth Army, on the one hand, and the Corps of Area Commanders on the other hand.

(8) That all arrangements be accomplished with the utmost secrecy.

(9) That adult males (above the age of 14 years) be interned separately from all women and children until the establishment of family units can be accomplished.

(10) No change is contemplated in Category "B" areas.

3. Although so far as the Army is concerned, such action is not an essential feature of the plan, but merely incidental thereto, I, nevertheless, recommend that mass internment be considered as largely a temporary expedient pending selective resettlement, to be accomplished by the various Security Agencies of the Federal and State Governments.

4. The number of persons involved in the recommended evacuation will be approximately 133,000. (This total represents all enemy aliens and Japanese-American citizens in Category "A" areas recommended to date.)

5. If these recommendations are approved detailed plans will be made by this headquarters for the proposed evacuation. The number evacuated to be apportioned by the Provost Marshal General among the Corps Area Commanders concerned as the basis for formulating their re-

spective plans. It is possible that the State of California, and perhaps the State of Washington, will be able to offer resettlement facilities for a given number of evacuees who may be willing to accept resettlement.

6. Pending further and detailed study of the problem, it is further recommended: (1) That the Commanding General, Western Defense Command and Fourth Army, coordinate with the local and State authorities, in order to facilitate the temporary physical protection by them of the property of evacuees not taken with them; (2) That the Commanding General, Western Defense Command and Fourth Army, determine the quantity and character of property which the adult males, referred to in paragraph 2b (9), may be permitted to take with them; and (3) That the Treasury Department or other proper Federal agency be responsible for the conservation, liquidation, and proper disposition of the property of evacuees if it cannot be cared for through the usual and normal channels.

J. L. DEWITT,  
Lieutenant General, U. S. Army,  
Commanding.

1 Incl: Map (in dup.).

# EXHIBIT H

## EXECUTIVE ORDER NO. 9066

February 19, 1942

### Authorizing the Secretary of War to Prescribe Military Areas

Whereas, The successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 65 Stat. 655 (U.S.C., Title 50, Sec. 104) :

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorized and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restriction the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General



under the Proclamation of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigations of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

Franklin D. Roosevelt

The White House, February 19, 1942.

# EXHIBIT I

## Civilian Exclusion Order No. 5

WESTERN DEFENSE COMMAND AND FOURTH ARMY  
WARTIME CIVIL CONTROL ADMINISTRATION

Presidio of San Francisco, California

April 1, 1942

### INSTRUCTIONS TO ALL PERSONS OF JAPANESE ANCESTRY

#### LIVING IN THE FOLLOWING AREA:

All that portion of the City and County of San Francisco, State of California, lying generally west of the north-south line established by Junipero Serra Boulevard, Worchester Avenue, and Nineteenth Avenue, and lying generally north of the east-west line established by California Street, to the intersection of Market Street, and thence on Market Street to San Francisco Bay.

All Japanese persons, both alien and non-alien, will be evacuated from the above designated area by 12:00 o'clock noon, Tuesday, April 7, 1942.

No Japanese person will be permitted to enter or leave the above described area after 8:00 a. m., Thursday, April 2, 1942, without obtaining special permission from the Provost Marshal at the Civil Control Station located at:

1701 Van Ness Avenue  
San Francisco, California

The Civil Control Station is equipped to assist the Japanese population affected by this evacuation in the following ways:

1. Give advice and instructions on the evacuation.
2. Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property including: real estate, business and professional equipment, buildings, household goods, boats, automobiles, livestock, etc.
3. Provide temporary residence elsewhere for all Japanese in family groups.
4. Transport persons and a limited amount of clothing and equipment to their new residence, as specified below.

THE FOLLOWING INSTRUCTIONS MUST BE OBSERVED:

1. A responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each individual living alone, will report to the Civil Control Station to receive further instructions. This must be done between 8:00 a.m. and 5:00 p. m., Thursday, April 2, 1942, or between 8:00 a. m. and 5:00 p. m., Friday, April 3, 1942.
2. Evacuees must carry with them on departure for the Reception Center, the following property:
  - (a) Bedding and linens (no mattress) for each member of the family;
  - (b) Toilet articles for each member of the family;
  - (c) Extra clothing for each member of the family;
  - (d) Sufficient knives, forks, spoons, plates, bowls and cups for each member of the family;
  - (e) Essential personal effects for each member of the family.

All items carried will be securely packaged, tied and plainly marked with the name of the owner and numbered in accordance with instructions received at the Civil Control Station.

The size and number of packages is limited to that which can be carried by the individual or family group.

No contraband items as described in paragraph 6, Public Proclamation No. 3, Headquarters Western Defense Command and Fourth Army, dated March 24, 1942, will be carried.

3. The United States Government through its agencies will provide for the storage at the sole risk of the owner of the more substantial household items, such as iceboxes, washing machines, pianos and other heavy furniture. Cooking utensils and other small items will be accepted if crated, packed and plainly marked with the name and address of the owner. Only one name and address will be used by a given family.

4. Each family, and individual living alone, will be furnished transportation to the Reception Center. Private means of transportation will not be utilized. All instructions pertaining to the movement will be obtained at the Civil Control Station.

Go to the Civil Control Station at 1701 Van Ness Avenue, San Francisco, California, between 8:00 a. m. and 5:00 p. m., Thursday, April 2, 1942, or between 8:00 a. m. and 5:00 p. m., Friday, April 3, 1942, to receive further instructions.

J. L. DEWITT  
Lieutenant General, U. S. Army  
Commanding

See Civilian Exclusion Order No. 5



## EXHIBIT J

EDWARD J. ENNIS

REPLY TO:

Department of Justice  
 Alien Enemy Control Unit  
 Washington  
 April 30, 1943

## MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Japanese Brief

Last week with our draft of the *Hirabayashi* brief I transmitted to Mr. Raum some material which I thought he would find helpful in obtaining a background view of the context of this case. In particular, I sent him a copy of *Harpers Magazine* for October 1942, which contains an article entitled *The Japanese in America, The Problem and Solution*, which is said to be by "An Intelligence Officer". Without attempting to summarize this article, it stated among other things that:

1. The number of Japanese aliens and citizens who would act as saboteurs and enemy agents was less than 3,500 throughout the entire United States.
2. Of the Japanese aliens, "the large majority are at least passively loyal to the United States".
3. "The Americanization of Nisei (American-born Japanese) is far advanced."
4. With the exception of a few identified persons who were prominent in pro-Japanese organizations the only important group of dangerous Japanese were the Kibei (American-born Japanese predominantly educated in Japan).
5. "The identity of Kibei can be readily ascertained from United States Government records."
6. "Had this war not come along at this time, in another ten or fifteen years there would have been no

Japanese problem, for the Issei would have passed on, and the Nisei taken their place naturally in American communities and national life."

This article concludes: "To sum up: The 'Japanese Problem' has been magnified out of its true proportion largely because of the physical characteristics of the Japanese people. It should be handled on the basis of the *individual*, regardless of citizenship and *not* on a racial basis." (Emphasis in original.)

I thought this article interesting even though it was substantially anonymous. I now attach much more significance to it because a memorandum prepared by Lt. Com. K. D. Ringle, who has until very recently been Assistant District Intelligence Officer, 11th Naval District, in charge of naval intelligence in that district (which includes Los Angeles), and who was formerly Assistant District Intelligence Officer in Hawaii, has come to my attention. A comparison of this memorandum with the article leaves no doubt that the author of the *Harpers* article is Lt. Com. K. D. Ringle. There are many long passages in the first person relating to personal experiences which are identical in the two writings.

In addition, I am informed entirely unofficially by the persons in the Office of Naval Intelligence that Lt. Com. Ringle in fact was lent to War Relocation Authority to prepare a manual on the background of the Japanese who were being evacuated from an Intelligence or security viewpoint, for the use of the WRA personnel. After this memorandum was prepared permission was obtained to abstract it and publish it anonymously in *Harpers*. Thus the *Harpers* article, which clearly indicates that the method of evacuation was wrong and that it would have been sufficient to evacuate not more than 10,000 known Japanese and that it would now be safe to release all but not more than 10,000 presently identified Japanese, was written by a Naval Intelligence officer who was on duty from 1940 until very recently in the Los Angeles area,

from which approximately one-third of the evacuation came.

I have furthermore been most informally, but altogether reliably, advised that both the article and the WRA memorandum prepared by Lt. Com. Ringle represent the views, if not of the Navy, at least of those Naval Intelligence officers in charge of Japanese counter-intelligence work. It has been suggested to me quite clearly that it is the view of these officers that the whole evacuation scheme was carried on very badly and that it would have been sufficient to evacuate the following three groups:

1. The Kibei.
2. The parents of Kibei.
3. A known group of aliens and citizens who were active members of pro-Japanese societies such as the Japanese Navy League, the Military Virtue Society, etc.

Since the naval officers believe that it was necessary to evacuate only about 10,000 people they could have identified by name, they did not feel that it was necessary to evacuate all of the Japanese. Presumably, they did not make this view known fourteen months ago for the reasons that Secretary Knox was at that time greatly exercised about the Japanese Fifth Column and that, since it was the Army's problem, it was safer to keep quiet than to brave the political storm then raging.

In retrospect it appears that this Department made a mistake fourteen months ago in not bringing the Office of Naval Intelligence into the controversy. I suppose that the reason that it did not occur to any of us to do this was the extreme position then taken by the Secretary of the Navy.

To have done so would have been wholly reasonable, since by the terms of the so-called delimitation agreement it was agreed that Naval Intelligence should specialize

on the Japanese, while Army Intelligence occupied other fields. I have not seen the document, but I have repeatedly been told that Army, before the war, agreed in writing to permit the Navy to conduct its Japanese intelligence work for it. I think it follows, therefore, that to a very considerable extent the Army, in acting upon the opinion of Intelligence officers, is bound by the opinion of the Naval officers in Japanese matters. Thus, had we known that the Navy thought that 90% of the evacuation was unnecessary, we could strongly have urged upon Gen DeWitt that he could not base a military judgment to the contrary upon Intelligence reports, as he now claims to do.

Lt. Com. Ringle's full memorandum is somewhat more complete than the version published in Harpers and I think you will be interested in reading it. In the past year I have looked at great numbers of reports, and memoranda, and articles on the Japanese, and it is my opinion that this is the most reasonable and objective discussion of the security problem presented by the presence of the Japanese minority. In view of the inherent reasonableness of this memorandum and in view of the fact that we now know that it represents the view of the Intelligence Agency having the most direct responsibility for investigating the Japanese from the security viewpoint, I feel that we should be extremely careful in taking any position on the facts more hostile to the Japanese than the position of Lt. Com. Ringle. I attach the Department's only copy of this memorandum.

Furthermore, in view of the fact that the Department of Justice is now representing the Army in the Supreme Court of the United States and is arguing that a partial, selective evacuation was impracticable, we must consider most carefully what our obligation to the Court is in view of the fact that the responsible Intelligence agency regarded a selective evacuation as not only sufficient but preferable. It is my opinion that certainly one of the most difficult questions in the whole case is raised



by the fact that the Army did not evacuate people after any hearing or on any individual determination of dangerousness, but evacuated the entire racial group. The briefs filed by appellants in the Ninth Circuit particularly pressed the point that no individual consideration was given, and I regard it as certain that this point will be stressed even more, assuming that competent counsel represent appellants, in the Supreme Court. Thus, in one of the crucial points of the case the Government is forced to argue that individual selective evacuation would have been impractical and insufficient when we have positive knowledge that the only Intelligence agency responsible for advising Gen. DeWitt gave him advice directly to the contrary.

In view of this fact, I think we should consider very carefully whether we do not have a duty to advise the Court of the existence of the Ringle memorandum and of the fact that this represents the view of the Office of Naval Intelligence. It occurs to me that any other course of conduct might approximate the suppression of evidence.

As I have said, my information that the Ringle memorandum represents the view of the Office of Naval Intelligence has come to me informally. I feel, therefore, that we have an obligation to verify my informal information. I believe that we should address an inquiry to the Secretary of the Navy, making reference to the Ringle memorandum, and stating that we have been advised that this represents the Navy's view and asking the Secretary if in fact the views of ONI, at the time of the evacuation, coincided with Com. Ringle's.

The Ringle memorandum originally came into my possession from WRA and we noticed the parallel between the memorandum and the article in this office. Attorneys for WRA furthermore are among the persons who have advised us that the Ringle memorandum represents the official Navy view. In view of the fact that any other

information which I have obtained is highly confidential, I would prefer to refer in a letter to Secretary Knox only to WRA.

I have prepared for your consideration a draft of a letter which you might wish to send to Mr. Knox.

/s/ Edward J. Ennis  
Director, Alien Enemy Control  
Unit

Attachment

## EXHIBIT K

Department of Justice  
 Alien Enemy Control Unit  
 Washington  
 April 12, 1944

## MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Letter from Federal Communications Commission  
 on alleged Japanese radio signals

The letter of April 4 from Chairman Fly of the Federal Communications Commission pertaining to General DeWitt's allegations that there were hundreds of interceptions of unidentified radio signals on the West Coast, particularly in the light of Mr. Hoover's earlier memorandum to you on the same subject, suggests not only that many of the facts recited by General DeWitt as justifying the evacuation were incorrect, but that General DeWitt knew them to be false. It appears that FCC was in constant communication with his headquarters and advised him that there were no radio signals which they could not identify and that General DeWitt nevertheless reported the existence of such signals in a formal report to the Secretary of War made public by the War Department.

I have been told that the Secretary of the Interior is presently looking into the whole Japanese problem himself and that the question of permitting some American citizens of Japanese ancestry now to return to the Pacific Coast may well arise before long. Under these circumstances I think it would be of value for Mr. Ickes to be as familiar as possible with the kind of problem which he has inherited and, for this reason, I recommend that copies of Mr. Fly's letter and memorandum be furnished him.

I annex a proposed letter for this purpose.

Respectfully,

/s/ John L. Burling  
 JOHN L. BURLING

Attachments



## EXHIBIT L

Department of Justice  
 Alien Enemy Control Unit  
 Washington  
 September 30, 1944

## MEMORANDUM FOR MR. HERBERT WECHSLER

Re: *Korematsu v. United States*

I understand that the War Department is currently discussing with the Solicitor General the possibility of changing the footnote in the *Korematsu* brief in which it is stated that this Department is in possession of information in conflict with the statements made by General DeWitt relating to the causes of the evacuation. Mr. Burling and I feel most strongly that three purposes are to be served by keeping the footnote in its present form.

(1) This Department has an ethical obligation to the Court to refrain from citing it as a source of which the Court may properly take judicial notice if the Department knows as to other statements that there is such contrariety of information that judicial notice is improper. (2) Since the War Department has published a history of the evacuation containing important misstatements of fact, including imputations and inferences that the inaction and timidity of this Department made the drastic action of evacuation necessary, this Department has an obligation, within its own competence, to set the record straight so that the true history may ultimately become known. (3) Although the report deals extensively with the activities of this Department and with the relationship of the War Department to this Department, the report was published without its being shown to us. In addition, when we learned of its existence, we were on one occasion advised that the report would never be published and, on another occasion when we asked that re-

lease be held up so that we could consider it, we were told that the report had already been released although in fact the report was not released until two weeks thereafter. In view of the War Department's course of conduct with respect to the report, we are not required to deal with the report very respectfully.

## I

As to the propriety of taking judicial notice of the contents of the report, it will be sufficient to point out that (1) the report makes an important misstatement concerning our published alien enemy procedures; (2) the report makes statements concerning radio transmissions directly contradicted by a letter from the Federal Communications Commission, and (3) the report makes assertions concerning radio transmissions and ship-to-shore signaling directly contradicted by a memorandum from the Federal Bureau of Investigation.

## II

The wilful historical inaccuracies of the report are objectionable for two different reasons. (1) The chief argument in the report as to the necessity for the evacuation is that the Department of Justice was slow in enforcing alien enemy control measures and that it would not take the necessary steps to prevent signaling whether by radio or by lights. It asserts that radio transmitters were located within general areas but this Department would not permit mass searches to find them. It asserts that signaling was observed in mixed occupancy dwellings which this Department would not permit to be entered. Thus, because this Department would not allow the reasonable and less drastic measures which General DeWitt wished, he was forced to evacuate the entire population. The argument is untrue both with respect to what this Department did and with respect to the radio transmissions and signaling, none of which existed, as General

DeWitt at the time well knew. (2) The report asserts that the Japanese-Americans were engaged in extensive radio signaling and in shore-to-ship signaling. The general tenor of the report is not only to the effect that there was a reason to be apprehensive, but also to the effect that overt acts of treason were being committed. Since this is not so it is highly unfair to this racial minority that these lies, put out in an official publication, go uncorrected. This is the only opportunity which this Department has to correct them.

### III.

As to the relations of this Department to the report, the first that we knew of its existence was in April, 1942, when we requested Judge Advocate General Cramer to supply any published material in the War Department's possession on the military situation on the West Coast at the time of the evacuation to be used in the Hirabayashi brief in the Supreme Court. Colonel Watson, General DeWitt's Judge Advocate, stated that General DeWitt's report was being rushed off the press and would be available for consideration. I was then advised, however, that the printed report was confidential and I could not see it but I was given 40 pages torn out of the report on the understanding that I return them which, unfortunately, I have done. Because these excerpts misstated the facts as I knew them and misstated the relations between the Department of Justice and the War Department, I suggested to the Solicitor General that he might wish to discuss with the Attorney General the matter of the Attorney General taking up with the Secretary of War the question of showing us this report before it was released. Colonel Watson then advised me that Mr. McCloy was treating the report as a draft and my personal recollection is that McCloy stated in Mr. Biddle's presence that it was not intended to print this report. We did not hear about this report again until over six months later when I learned accidentally from Mr. Myer

of WRA that he had a copy of the report which the War Department was going to publish. I borrowed his copy and then Mr. Burling called Captain Hall, Mr. McCloy's Assistant Executive Officer, and pointed out to him that the report undertook to discuss relations between the War and Justice Departments without giving us a chance to examine it and it was my understanding that Mr. McCloy did not intend to have the report released. Captain Hall admitted that Mr. McCloy had stated that the report was not to be issued but stated that he was sorry but the report had already been released and there was nothing that could be done. We accepted his statement as true and did not check on it until two weeks had passed without any publicity and then when the report was discussed in the newspapers we checked with the public relations office of the War Department and they advised that the report had just been released and had not been released at the time Captain Hall said it had.

It is also to be noted that parts of the report which, in April 1942 could not be shown to the Department of Justice in connection with the Hirabayashi case in the Supreme Court, were printed in the brief amici curiae of the States of California, Oregon and Washington. In fact the Western Defense Command evaded the statutory requirement that this Department represent the Government in this litigation by preparing the erroneous and intemperate brief which the States filed.

It is entirely clear that the War Department entered into an arrangement with the Western Defense Command to rewrite demonstrably erroneous items in the report by reducing to implication and inference what had been expressed less expertly by the Western Defense Command and then contrived to publish this report without the knowledge of this Department by the use of falsehood and evasion.

For your information I annex copies of (a) my memorandum of April 20, 1943 to the Solicitor General, (b) my memorandum of January 21, 1944 to the Solicitor



General, (c) my memorandum of February 26, 1944 to the Attorney General, and (d) a transcript of Mr. Burling's conversation of January 7, 1944 with Captain Hall which clearly brings out the evasion and falsehood used in connection with the publication of the report.

I also annex copies of memoranda from the FBI and of an exchange of correspondence between the Attorney General and the Chairman of the Federal Communications Commission which establish clearly that the facts are not as General DeWitt states them in this report and also that General DeWitt knew them to be contrary to his report.

**RECOMMENDATION:** In view of the Attorney General's personal participation in, and final responsibility for, this Department's part in the broad administrative problem of treatment of the Japanese minority, I urge that he be consulted personally on this problem. Much more is involved than the wording of the footnote. The failure to deal adequately now with this Report cited to the Supreme Court either by the Government or other parties, will hopelessly undermine our administrative position in relation to this Japanese problem. We have proved unable to cope with the military authorities on their own ground in these matters. If we fail to act forthrightly on our own ground in the courts, the whole historical record of this matter will be as the military choose to state it. The Attorney General should not be deprived of the present, and perhaps only, chance to set the record straight.

/s/ Edward J. Ennis  
EDWARD J. ENNIS

## EXHIBIT M

September 13, 1942

1st Lt. John M. Hall, F. A.  
Acting Executive Officer  
Office of the Assistant Secretary of War  
War Department  
Washington, D.C.

Dear Lieutenant Hall:

Recently Colonel Tate indicated that the War Department is greatly concerned lest a writ of habeas corpus be granted a Japanese-American citizen, and he requested that a draft of proposed legislation be prepared which would have the effect of suspending the writ of habeas corpus as to persons of Japanese ancestry who have been excluded from any military area.

A draft of legislation to accomplish this purpose was prepared by this office, submitted to the Judge Advocate, Western Defense Command and Fourth Army, for comment, and, as revised, is submitted herewith (TAB A). For information only, the draft prepared by this office and a supporting brief, presenting the legal basis for such legislation, are also attached (TABS B and C).

The two submitted drafts of legislation, though substantially the same, present some differences that will be noted. For case of discussion, they will be referred to as Drafts A and B, in accordance with their tab designations:

a. Draft A provides that all persons of Japanese ancestry within the United States, whether evacuated from Western Defense Command Area or not, are within the provisions of the proposed act; Draft B limits the application of the act to only persons of Japanese ancestry now within Washington, Oregon, California and Arizona, or evacuated from Military Area No. 1 or the California portion of Military Area No. 2, and also to all persons

(including persons not of Japanese ancestry) within Washington, Oregon, California and Arizona.

b. Draft A proposes permanent legislation covering the period of the present invasion as well as the period of any future invasion. Draft B is limited by its terms to the present invasion.

c. Draft A authorizes suspension of the writ in any case involving Orders or Proclamations of the President, Secretary of War or designated military commanders; Draft B permits the suspension of the writ in any case in which a member of the designated classes of persons violates such an Order or Proclamation, as well as in cases of statutory violation.

The Western Defense Command Judge Advocate noted that the directive of Colonel Tate limited the proposed legislation to persons of Japanese ancestry, and has suggested that it might be advisable to extend the provision of the legislation to all persons subjected to the provisions of Proclamations or Order of the President, or of the Secretary of War, or military commanders acting under his authority.

Very truly yours,

/s/ Karl R. Bendetsen  
KARL R. BENDETSSEN  
Colonel, G.S.C.  
Assistant Chief of Staff  
Civil Affairs Division

Incls. Tabs A, B and C

# EXHIBIT O

March 10, 1942

## PRESS RELEASE

Lieutenant General J. L. DeWitt, commanding general of the Western Defense Command and Fourth Army, announced today that the Federal Reserve Bank of San Francisco has been appointed to assist Japanese and other evacuees situated within prohibited or restricted military areas in the disposition of their property.

The Treasury Department and the military authorities have given broad powers to the bank to enable it to carry out the objectives of the program. Bank officials indicated that they are undertaking this program under the direction of General DeWitt for the purpose of assisting military authorities in clearing up the problem presented by the war emergency.

The Federal Reserve Bank, acting in conjunction with the commanding general, plans to carry on the project through the bank's extensive facilities, as well as those of its branches in Seattle, Portland, and Los Angeles. The objective of the program will be to bring about a fair and just liquidation of that property which the evacuees cannot take with them.

The Federal Reserve Bank will establish other offices in the coastal areas in order that evacuees may receive impartial counsel and advice in their efforts to liquidate their property, as well as assistance in the sale or other disposition of their property. These offices also will take strong measures to protect the evacuees against unscrupulous creditors.

General DeWitt and Federal Reserve officials stated that the government does not plan to take title to the property of the evacuees. On the contrary, it is their intention to aid the evacuees in a voluntary liquidation of their property at reasonable prices and to protect them against individuals who seek to take advantage of their situation. If need be, officials stated, the bank will



be prepared to take over the control of the property under powers of attorney in order to protect the property interest of the evacuee. Evacuees will be encouraged to come in and discuss their problems relating to the disposition of their property. No one will be compelled to come in, but those desiring the bank's services will find competent and impartial men prepared to assist them in their problems.

General DeWitt made clear that speed and fairness are the keynotes of this program and that expeditious handling of the evacuee's property is essential because of the urgency of the West Coast situation.

Officials stated that the Federal Reserve Bank will work in close cooperation with Federal, state, and local public agencies that may be called upon for assistance in dealing with the property of evacuees during the course of its liquidation. These agencies have been or undoubtedly will be called upon by the military authorities to handle other aspects of the evacuation problem, such as the transportation and the resettlement of the evacuees and their reemployment in new areas. Banks and other institutions in the various communities throughout the West Coast area will be called upon to do their full part in bringing about an orderly and equitable disposition of the evacuee's property.

General DeWitt stated that he had been requested by the Federal Reserve Bank to point out that Treasury Department freezing regulations will not interfere with the program. This is particularly true in view of the amendment to General License No. 68A being released by the Federal Reserve Bank. The General License now permits Japanese evacuees operating under such license to dispose of their property without restriction.

## EXHIBIT P

## QUESTIONS AND ANSWERS FOR EVACUEES

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 Information Regarding the Relocation Program

*Issued by*

## THE WAR RELOCATION AUTHORITY

Regional Office

San Francisco, California

WAR RELOCATION AUTHORITY

WASHINGTON, D.C.

## PREPARING FOR RELOCATION

Question 1: When I am evacuated, where will I go?

Answer: You will, most likely, first go to an Assembly Center, a temporary stopping place where you and your family will be provided with food, shelter, medical care, and protection until you leave for a Relocation Center, at which there will be permanent housing, work opportunities, educational facilities, and other essentials of a normal community. (In some areas evacuees will go directly from their homes to Relocation Centers.)

Question 2: Before I leave for an Assembly Center should I sell or store my household goods?

Answer: Keep in mind that you will be going to a war-duration Relocation Center after you leave the Assembly Center, and that many of your household goods will be needed in your new home at the Relocation Center. So do not needlessly dispose of or sacrifice things you may need. During the evacuation, at the time you receive instructions at your local civil control office, you will be informed that your household goods may be stored for you free of charge while you are at the Assembly Center, provided you box and crate these goods suitably. As soon as you move to your war-duration home at a Relocation Center the War Relocation Authority will have these goods brought to you.

Question 3: What kind of household goods should I store, keeping in mind that they will be brought to me later at a Relocation Center?

Answer: At least the essential household equipment and personal belongings for your family—except refrigerators and stoves, which will not be needed. We suggest that you keep chairs, tables, beds, rugs, etc. We particularly recommend that you keep your sewing machines, hand tools, games, books and musical instruments.

Question 4: What kind of clothes should I take with me when I am evacuated?

Answer: Be prepared for the Relocation Center, which is a pioneer community. So bring clothes suited to pioneer life and in keeping with the climate or climates likely to be involved. Bring work clothes, boots, slacks, and work shirts, rather than business suits or street dresses. Bring warm clothing even if you are going to a southern area, because the temperatures may range from freezing in winter to 115° during some periods of the summer. Although you won't want to take many extra clothes to the Assembly Center, be sure to save and store all of the extra clothing that may be needed later at the Relocation Area.

Question 5: Should I bring any food? Any cooking devices?

Answer: Non-perishable foods may be stored to be brought to you with your household goods, as for example, canned goods, tea, coffee, etc. Meals will be served at central mess halls. You may install supplemental cooking devices, such as electrical cooking devices in your own quarters only if the fire hazard is negligible and if the fire regulations of your own community council so permit.

Question 6: Shall I bring towels, dish cloths, curtains, sheets, pillow cases, small rugs?

Answer: Yes, these all will be useful.

Question 7: Shall I pack blankets and bedding to be brought to the Relocation Center?

Answer: Yes, by all means.

Question 8: Shall I bring tools, gardening equipment, etc.?

Answer: These will be needed at Relocation Centers. If you have stored them, the War Relocation Authority will ship them to your Relocation Center.



Question 9: Shall I bring toys, athletic equipment and books?

Answer: Yes, but they should be placed in storage to be shipped to you later.

Question 10: Will there be a place for pianos and other large musical instruments?

Answer: Yes, at recreation halls at the Centers.

Question 11: What cannot be brought?

Answer: Short-wave radios, cameras, weapons, any other contraband material, and alcoholic beverages.

#### WHAT FACILITIES AT RELOCATION CENTERS

Question 12: Will food, shelter and medical attention be provided?

Answer: Yes.

Question 13: Will educational facilities be provided?

Answer: Yes. One of the first jobs of the War Relocation Work Corps will be to build schools and school equipment at Relocation Centers. Nursery schools, elementary schools, and high schools will be maintained. Plans are being considered whereby university students may be able to attend [illegible] colleges and universities.

Question 14: Will stores be available?

Answer: Yes.

Question 15: What can I purchase at project stores?

Answer: Provisions will be made for purchase of necessary commodities.

Question 16: Will there be a post office?

Answer: Yes.

Question 17: Can I receive mail, magazines, newspapers, books and merchandise by mail?

Answer: Yes.

Question 18: Can I send mail from camp?

Answer: Yes.

Question 19: Will banking facilities be available?

Answer: Yes, limited banking facilities will be provided, but the exact method for supplying these facilities has not yet been worked out.

Question 20: Can I bring a long-wave radio or listen to one in camp?

Answer: Yes.

Question 21: Can I bring a short-wave radio?

Answer: No.

Question 22: Will there be storage facilities at the Relocation Centers?

Answer: Yes, storage facilities will be available for household goods which cannot be immediately [illegible] in your living quarters. Goods in such storage will be accessible to owners.

Question 23: What living quarters will be provided for me and my family?

Answer: The living quarters for a family of five consist of an apartment approximately 20 x 25 feet.

Question 24: How will this apartment be furnished?

Answer: When you first arrive at a Relocation Center your living quarters will be furnished with army cots and mattresses; also an oil heater, when necessary, and electric lights. As soon as your own household effects are brought to you at the Center, including your own beds and bedding, the issued cots and mattresses will be withdrawn.

Question 25: May I install partitions in my living quarters or make my own furniture?

Answer: Yes, simple materials will be provided for these purposes, if available.

Question 26: May we improve the quarters by using wall board, plywood, shelving, curtains, etc.?

Answer: Yes, if you can supply materials yourself or if funds available permit the War Relocation Authority to provide them.

Question 27: Are bathing, toilet, and laundry facilities available?

Answer: Separate buildings are provided containing bathing, toilet, and laundry facilities.

Question 28: Will there be street lighting at night?

Answer: Yes.

Question 29: Will families be permitted to cook their own meals at Relocation Centers?

Answer: No. Complete kitchen equipment cannot be obtained for individual kitchens. Further, the fire hazard would be too great if there were extensive cooking facilities operated in each apartment.

Question 30: How will meals be obtained?

Answer: All regular meals will be cooked and served at community dining halls.

Question 31: Will this be "American-style" or "Japanese-style" food?

Answer: Both.

Question 32: Will special food be available for babies and small children?

Answer: Yes.

Question 33: Will special food be available for nursing mothers or patients under care of a physician?

Answer: Yes, on request of the physician.

Question 34: Can food be obtained elsewhere?

Answer: You may buy some foods at the project canteen.

## WORK

Question 35: Who may enlist in the Work Corps?

Answer: Any able-bodied man or woman above the age of 16.

Question 36: Do I have to be a citizen of the United States to enlist?

Answer: No.

Question 37: Is enlistment compulsory?

Answer: No. It is entirely voluntary.

Question 38: Where may I enlist?

Answer: At an Assembly Center or Relocation Center.

Question 39: How long will enlistment last?

Answer: Until 14 days after the end of the war.

Question 40: What types of work will be available to enlistees in the Work Corps?

Answer: Practically all types, especially those concerned with agriculture, irrigation, manufacturing, small businesses, medicine, education, and camp administration. The tentative plan is to have each Relocation Project function as a type of cooperative.

Question 41: How will I obtain cash to pay for newspapers, tooth paste, tobacco, and so on?

Answer: Monthly cash advances will be made to all enlistees who work.

Question 42: Will my earnings depend on the type of work I perform?

Answer: Yes. Types of work will be classified and earnings will be apportioned on the basis of these classifications.



Question 43: If several members of the same family enlist in the Corps, will each receive the monthly cash advances?

Answer: Yes.

Question 44: Just what is meant by "cash advances"?

Answer: This term is used instead of the term "wages" for this reason: Each Relocation Project will maintain a set of books in which will be kept all costs and all income. Among the costs recorded will be those for food, heat, light, medical care, clothing, and "cash advances." If the project makes a profit over and above all costs, including the "cash advances", you will be entitled to a share in proportion to the amount and character of work you have performed; the profits may come to you in the form of increased monthly "cash advances."

Question 45: If we raise food which we use in the mess halls, will we receive credit for it?

Answer: Yes. Decidedly so. Food raised on the project will reduce project costs, which in turn will enhance the opportunity for profit.

Question 46: How much will the cash advances amount to each month?

Answer: This will be announced soon. The only official statement on this subject is that under present conditions the maximum cash advance will not exceed the minimum cash pay of the American private soldier.

Question 47: May I obtain cash advances if I do not enlist in the War Relocation Work Corps?

Answer: No.

Question 48: It is to our interest, then, to do all we can to keep down costs and to increase the income of the project?

Answer: Yes.

Question 49: Will evacuees be permitted to do the book-keeping, stenographic, and related work?

Answer: Yes.

Question 50: Will the administrative cost of the War Relocation Authority be charged against each project?

Answer: No.

Question 51: If the project fails to make money, will we be indebted to the Government for the advances made to us?

Answer: No.

Question 52: What other benefits will I get by enlisting in the Work Corps?

Answer: The War Relocation Authority has pledged that not only will enlistment permit your participation in project activities, but it will also serve as evidence of your loyalty to America.

#### BUSINESS MATTERS

Question 53: Can I receive rents, profits, dividends or royalties from businesses or property I own outside the project?

Answer: Yes.

Question 54: Can I make investments in securities, mortgages and war bonds?

Answer: Yes.

Question 55: Can I continue business negotiations with banks, businesses or individuals outside the Relocation Center?

Answer: Yes.

## HEALTH AND MEDICINE

Question 56: Will physicians and nurses be available?

Answer: Yes.

Question 57: Will a hospital be available at the Relocation Center?

Answer: Yes, basic hospital facilities will be available. However, one of the first jobs of the Work Corps will be to improve these facilities according to the desires of the community.

Question 58: What vaccinations are necessary when I settle at a Relocation Center?

Answer: To protect the health of the community it is necessary for all evacuees to be vaccinated against small-pox and inoculated against typhoid fever.

## DEPARTURE FROM THE RELOCATION CENTER

Question 59: Can I obtain temporary leave of absence from the Relocation Center?

Answer: Short furloughs may be granted by the Project Director and the Military Authorities on matters of necessity concerning legal, business, or medical problems. Special leaves of absence may be granted to enlistees for purposes of private employment, under appropriate safeguards, and to university students to attend colleges and universities where satisfactory arrangements can be made with such institutions. A non-government committee has been set up to attempt to work out a program which may enable American citizen Japanese students to attend colleges and universities outside [illegible] military zone.

Question 60: Can I leave the Center to obtain a job in the vicinity?

Answer: Furloughs may be granted enlistees in the Work Corps to accept private employment, under the following conditions:

1. That the State and local communities involved provide adequate protection and guarantee the safety of evacuees and communities.
2. That recruitment is on a voluntary basis.
3. That workers are assured of receiving prevailing wages.
4. That employers provide, without cost to the Government, transportation from Centers to the work location and return.
5. That employers provide suitable housing for evacuees at work locations.

## MISCELLANEOUS

Question 61: Will families be kept together?

Answer: Yes, wherever members of the family so desire.

Question 62: May I be moved from one Relocation Center to another?

Answer: Yes, if this appears necessary for the public welfare. However, the Authority wants your communities to be as stable as possible, and you may be assured that enlistees will not be transferred from one Center to another unless absolutely necessary.

Question 63: Can I get married while in the Center?

Answer: Yes.

Question 64: Can I be divorced while in the Center?

Answer: Yes.

Question 65: Can I sue or be sued?

Answer: Yes.



Question 66: Can I defend myself in a suit brought outside the project?

Answer: Yes.

Question 67: Will there be religious freedom?

Answer: Yes.

Question 68: Am I liable to draft for service in the Army like any other American through the Selective Service System?

Answer: Yes.

Question 69: Will communities at Relocation Centers be permitted to establish their own community governments?

Answer: Yes. It will be up to each community to plan its design of community life within the broad basic policies determined by the Authority for over-all administration of Relocation Areas. Eligible voters will nominate and elect officers and officials and organize institutions necessary for the efficient conduct of a typical community. The community government will draft ordinances and regulations and provide for their enforcement, subject to such restrictions as military necessity may impose on the over-all supervision of the Relocation Areas.

Question 70: What provisions will be made to keep law and order?

Answer: The Army has the responsibility of maintaining external protection and of controlling ingress and egress. Internal protection will be maintained by the community and the War Relocation Authority.

Question 71: Will visitors be allowed at the Center?

Answer: Yes, subject to such reasonable limitations as may be necessary for good administration of the area.

## KEEP THESE DEFINITIONS IN MIND

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**Assembly Center**—A convenient gathering point, within the military area, where evacuees live temporarily while awaiting the opportunity for orderly, planned movement to a Relocation Center outside of the military area.

**Relocation Center**—A pioneer community, with basic housing and protective services provided by the Federal Government, for occupancy by evacuees for the duration of the war.

**Relocation Area**—The entire area surrounding a Relocation Center, under the jurisdiction of the War Relocation Authority. The relocation lands are Federally owned, are designated as military areas, and are protected by military police.

**Work Project**—Work projects, such as development of irrigated land, manufacturing enterprises, and farming, undertaken by the War Relocation Work Corps.

**Enlistee**—A person who enlists in the War Relocation Work Corps. Enlistment is for the duration of the war.

## EXHIBIT Q

WAR RELOCATION AUTHORITY  
TENTATIVE POLICY STATEMENT*Foreword*

The War Relocation Authority was established by Executive Order 9102 signed by the President on March 18, 1942. By terms of the Order, the Authority is responsible for: (1) aiding the Army in carrying out the evacuation of military areas, (2) developing and supervising a planned, orderly program of relocation for evacuees, (3) providing evacuees with work opportunities so that they may contribute to their own maintenance and to the national production program, and (4) protecting evacuees from harm in the areas where they are relocated. The first specific task of the Authority is to resettle some 100,000 alien and American-born Japanese evacuated from military areas of the far western states.

The evacuation of persons of Japanese ancestry and their relocation inland on Federally supervised projects should not be confused with the program under which enemy aliens suspected of acts or intentions against the national security are interned. The present WRA program is concerned with a group composed mainly of American citizens and loyal individuals who have been removed from their homes for reasons of military security and for their own bodily protection. The objective of the program is to provide, for the duration of the war and as nearly as wartime exigencies permit, an equitable substitute for the life, work, and homes given up, and to facilitate participation in the productive life of America both during and after the war.

*Community Living*

The project management and the evacuees themselves should bear jointly the responsibility for making the com-

munity life of each relocation center as normal and complete as possible. The War Relocation Authority will provide the basic essentials of living. The evacuees will be encouraged in every way to build on this base. The principal obligations taken on by the Authority and those which it is expected the evacuees will assume are outlined below.

## A. WRA obligations on community matters.

1. *Maintenance of Families as Units*

Families will be permitted to remain completely intact—if the individual members so wish—in the relocation centers. Efforts will be made to keep together individuals and groups of similar background and interest.

2. *Living Quarters*

There is to be no overcrowding in evacuee living quarters. All quarters must be properly heated, lighted, and ventilated at all times. Cleanliness, sanitation, and precautions against fire must be maintained. The WRA will provide building material without charge to evacuees who wish to improve their living quarters.

3. *Shipment of Household Goods*

As a service to evacuees who wish to have their furniture and household articles in their new homes, the Authority will arrange for the shipment of all such goods in storage to the relocation centers without cost to the evacuees.

4. *Sanitary Installations and Plumbing Facilities*

Evacuees should have ready access to acceptable sanitary installations, which must be kept in a constant state of cleanliness. Laundry facilities and shower baths with an ade-



quate supply of hot and cold water should be continuously available.

5. *Food*

Food served at community mess should supply an adequate diet at a cost less than the cost of rations provided to the United States Army. Special diets prescribed by competent medical authorities for children, infants, nursing and pregnant women, invalids, and others should always be supplied. Foods rationed to the whole American people will usually be available to evacuees in the same ratio as to the general public.

6. *Clothing Allowances*

For the time being the War Relocation Authority, upon application, will furnish outer work clothing and footgear for those enlistees engaged in outdoor tasks which involve especially hard or rapid wear on clothing and shoes. Enlistees engaged in inside work on tasks involving no more than a normal degree of clothing wear will be expected to provide their own work clothing and shoes.

7. *Health Facilities*

Necessary medical and dental attention, medicine, and hospital facilities will be provided in each relocation center. As far as practicable, the services of evacuees with qualified professional status will be utilized. Evacuees who are ill with contagious diseases will be transferred promptly to an infirmary or hospital.

8. *Educational Opportunities*

Elementary and high school education will conform generally to the standards of the

State in which the relocation center is established. Fully qualified teachers will be used, including wherever possible qualified teachers from the evacuee group. Japanese language instruction will not be permitted in any school. Denominational schools, established without expense to the government, may be authorized under conditions prescribed by the project self-government and approved by the Director of the War Relocation Authority. Establishment of nursery schools, under auspices of the evacuees, will be encouraged. Any university education which may be undertaken at a relocation center without cost to the Federal government will also be encouraged; university students may transfer to mid-western colleges and universities under appropriate conditions (see page 26).

9. *Care of Persons Without Means of Support*

Public assistance grants at a rate not to exceed \$3 per month per unattached individual, \$5 per month for a family of two, \$6 per month for a family of three, \$7 per month for a family of four, and \$7.50 per month for a family of five or over, may be made by the project director to (a) individuals who are unable to work because of illness (after 15 days sick leave) or incapacity, (b) children without support under 16 years of age, and (c) families without a worker. Such cash grants will be in addition to the shelter, food, medical care, and education provided to such individuals or families. The project director will make a special monthly report of such grants to the regional director. As soon as each community is in a position to bear this type of expense itself, cash grants will be discontinued.

10. *System of Appeals*

Procedure by which evacuees can register complaints concerning project management will be announced by each project director, and provision will be made for appeal to the Regional Director and to the Director of the War Relocation Authority.

11. *Leisure-Time Activities*

Each project director will assist the evacuee government in planning a program of leisure-time activities. Plans will include (a) opportunities for adult education and vocational training and (b) all types of recreation.

12. *Religion*

At each relocation project, the WRA will provide material for the construction of one building to be used as a general center of worship by the several denominations represented in the community. Suitable altar furnishings will have to be provided by each denomination and a schedule of periods for worship will have to be arranged.

13. *Use of Private Funds*

WRA will impose no limitation on the use of private funds which evacuees may bring with them to the relocation centers. Any evacuee in a position to pay for the full cost of his subsistence without enlisting in the Work Corps will be permitted to do so. (See pages 26-28)

14. *Burial*

Where private funds are insufficient, the WRA will provide for the local burial of evacuees who die during their residence at relocation centers.

**LISTING OF EXHIBITS TO THE  
AMENDED COMPLAINT AND THEIR  
EARLIEST KNOWN DATE OF PUBLICATION**

Exhibit	Earliest Known Date and Source of Publication
A	1983—Complaint, Hohri v. United States
B	1983—Complaint, Hohri v. United States
C	1946—Joint Congressional Committee on the Investigation of the Pearl Harbor Attack
D	1949—M. Grodzins, <i>Americans Betrayed: Politics and the Japanese Evacuation</i>
E	1949—M. Grodzins, <i>Americans Betrayed: Politics and the Japanese Evacuation</i>
F	1972—R. Daniels, <i>Concentration Camp. USA: Japanese Americans and World War II</i>
G	1944-1945—Public release of <i>Final Report</i>
H	1942—Immediate public release
I	1942—Immediate public release
J	1983—Complaint, Hohri v. United States
K	1983—Complaint, Hohri v. United States
L	1983—Complaint, Hohri v. United States
M	1983—Complaint, Hohri v. United States
N	1983—Immediate public release
O	1942—Immediate public release
P	1942—Immediate public release
Q	1983—Complaint, Hohri v. United States



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 83-750

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WILLIAM HOHRI, *et al.*, PLAINTIFFS

*vs.*

UNITED STATES OF AMERICA, DEFENDANTS

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AFFIDAVIT OF PETER IRONS

STATE OF CALIFORNIA    )  
                                  )   ss  
COUNTY OF SAN DIEGO   )

PETER IRONS, being duly sworn, deposes and states as follows:

1. My name is Peter Irons. I am currently Assistant Professor of Political Science at the University of California, San Diego, where I teach courses in constitutional law and the American legal system. I have held this position since July, 1982. My prior teaching experience in the field of law includes positions as Instructor of Law at Boston College Law School and as Visiting Professor of Legal Studies at the University of Massachusetts, Amherst.

2. My academic training includes an M.A. and Ph.D. in political science from Boston University Graduate School, with the latter degree awarded in 1973. I also received a J.D. degree from Harvard Law School in

1978. I am a member of the bars of the Commonwealth of Massachusetts and the United States District Court for Northern California.

3. My scholarly research and writing has been in the fields of American legal and constitutional history. In addition to several articles in such journals as the *Harvard Law Review* and *American Legal Studies Forum*, I am the author of two books: *The New Deal Lawyers* (Princeton University Press, 1982) and *Justice at War: The Story of the Japanese American Internment Cases* (Oxford University Press, 1983).

4. In the course of my scholarly research, I have become familiar with federal government litigation files as a source of research material, and have made extensive use in my writings of files located in the National Archives in Washington, D.C.

5. In August, 1981, I began research for a book on the roles of both government and defense lawyers in the Japanese American internment cases decided by the U.S. Supreme Court during World War II. I selected this topic for two major reasons: first, because the Court's opinions in these cases were of constitutional and historic importance; and second, because I believed that the records of both groups of lawyers would be available for research and had not previously been made use of by other scholars.

6. I began my research for this book with a review of the existing literature on the Japanese American internment and the Supreme Court opinions. My review revealed that none of the existing books or articles on these topics made reference to records of the Department of Justice on the internment cases.

7. Once I concluded this initial review of the literature, I decided to attempt to locate and secure access to the original litigation files of the Department of Justice in the internment cases decided by the Supreme Court. From a card index file located in the National Archives, I obtained the Department's file numbers in these cases,

but was told by the Archives staff that these files remained in the custody of the Department.

8. During the latter part of August, 1981, I made a telephone inquiry to Robert Yahn of the Public Information Office of the Department of Justice, whose name had been given to me by a member of the Archives staff as a person who could help in locating the litigation files. Mr. Yahn was cooperative and expressed a desire to aid in my search, but he told me that he did not personally know where the files were located, and referred me to E. Ross Buckley of the Department's Freedom of Information/Privacy Act Office.

9. In a subsequent telephone conversation with Mr. Buckley in late August or early September, 1981, I explained that the files I sought had been compiled by the Alien Enemy Control Unit of the Department. This wartime division had been established by the Attorney General in December, 1941, and was headed by Edward J. Ennis. My research in the Government Organization Manuals of this period disclosed that the AECU had been dissolved in 1946.

10. In response to my inquiry, Mr. Buckley told me that he would undertake a search of records of the Criminal Division, the Civil Division, and the Solicitor General's office, and that he would contact me when he completed this search.

11. At some time in October, 1981, Mr. Buckley called me by telephone and reported that this search in the records of the above-listed offices had been fruitless. Mr. Buckley stated that he would continue to search for the case files in the records of other divisions of the Department on the assumption that they had been transferred for storage to another division at some time after 1946.

12. I received another call from Mr. Buckley in October, 1981, in which he reported that the case files had been located in the records of the Immigration and Naturalization Service, and would be made available to me at the Freedom of Information/Privacy Act Office of

that agency, located in the Calvin Coolidge Building in Washington, D.C. Mr. Buckley explained his search to me in the following terms, to the best of my recollection: At some time in the early 1950s, as part of the Department's normal records-transfer procedure, the records of the Alien Enemy Control Unit had been sent to INS under the mistaken assumption that these records were part of the records of the Alien Enemy Hearings Boards (AEHB). The AEHB was a separate division of the Department, established in 1942 to conduct "loyalty" hearings for citizens of enemy countries (Germany, Italy, Japan, and several other Axis countries) who had been arrested after the declarations of war with these countries and held in internment camps administered by the Department. (It is important to note that these camps were *not* the "relocation centers" in which Americans of Japanese ancestry were held under the terms of Executive Order 9066 and the military orders issued by War Department officials).

Mr. Buckley further explained that he had located a transmittal slip, dated at some time in the early 1950s, that indicated that the records of the AECU were considered by the responsible official to be under the jurisdiction of the INS, although the latter agency had never had any connection with the AECU or with the internment cases.

13. At some time in October, 1981, I visited the Freedom of Information/Privacy Act Office of INS to examine the records located by Mr. Buckley. I spoke with Mr. Russell Powell of that office and was told that INS had received three cardboard boxes of AECU records from the Federal Records Center in Suitland, Maryland, accompanied by a transmittal slip from the Department of Justice. To the best of my recollection, this slip was attached to one of the boxes and had been signed by Mr. Buckley. Mr. Powell indicated that he had not reviewed or screened any of the records in these boxes. To my observation, the boxes were secured by twine and were



covered with dust. The boxes did not appear to have been opened at any recent time.

14. On this visit to the INS office, I spent an entire day of approximately eight hours in examination of the documents contained in these boxes. The documents were in files which displayed the case numbers I had secured in the National Archives, and included the files on the internment cases decided by the Supreme Court, as well as several other files I had requested of Mr. Buckley which related to other cases both criminal and habeas corpus proceedings, which had not reached the Supreme Court.

15. During conversation with Mr. Powell, I was informed that I was free to make notes from these records but that his office could not make photocopies for me at the time. I accordingly placed tabs provided by Mr. Powell on those documents I wished to be copies for me.

16. The afternoon of my visit to the INS office, I called Ms. Aiko Herzig-Yoshinaga of the research staff of the Commission on Wartime Relocation and Internment of Civilians (CWRIC). I had met Ms. Herzig-Yoshinaga in the National Archives at an early stage in my research and had learned from her that the Commission had been given statutory authority by the Congress to examine and make copies of any federal government records that related to the internment of Japanese Americans. The purpose of my call was to suggest that Ms. Herzig-Yoshinaga visit the INS office and secure photocopies of the documents I had tabbed, on the assumption that this would expedite my access to them and also make available to the Commission records that I believed would be of great interest to the Commission.

17. To the best of my knowledge, Ms. Herzig-Yoshinaga did visit the INS office and secured copies of the documents I had tabbed, approximately thirty in number. I subsequently received a copy of these documents from Ms. Herzig-Yoshinaga to aid in the preparation of testimony I had been asked to present to the Commission at

a hearing in Cambridge, Massachusetts on December 9, 1981. This testimony drew heavily on the documents I had examined at the INS office. To the best of my knowledge, the material from the Department of Justice files had not previously been made public and was of considerable importance in demonstrating that Department of Justice attorneys, including Edward J. Ennis and John L. Burling of the AECU, had protested to the Solicitor General and other high-ranking Department officials about the handling of the internment cases before the Supreme Court.

18. One example of such a protest is in a memorandum submitted to Solicitor General Charles Fahy by Mr. Ennis on April 30, 1943, in regard to the government's brief to the Supreme Court in *Hirabayashi v. United States*. In this memorandum, Mr. Ennis urged that the government admit to the Supreme Court that the so-called "Ringle Report" represented the informed views of the Office of Naval Intelligence and that it contradicted the War Department's justification for the mass evacuation of Japanese Americans. Mr. Ennis concluded that withholding of the Ringle Report and its source in the ONI "might approximate the suppression of evidence."

19. Another example of the significance of the Department of Justice records I examined is their demonstration that Mr. Ennis and Mr. Burling had unsuccessfully urged the Solicitor General to admit to the Supreme Court that FBI and Federal Communications Commission officials had provided evidence of the falsity of the espionage charges in the *Final Report* of General John L. DeWitt. The efforts of Mr. Ennis and Mr. Burling to include a footnote to this effect in the government's brief to the Supreme Court in *Korematsu v. United States*, in my opinion, shed considerable light on the impact of this withheld evidence on the Court's subsequent affirmance of Mr. Korematsu's conviction.

20. My statement and oral testimony to the Commission on this topic elicited from several of the Commission

members comments that indicated their surprise at the material I had obtained from the Department's files and their belief that this material was of significant concern to the Commission.

21. The material I obtained from the AECU records also formed the basis for a considerable portion of my book on the internment cases, *Justice at War*. This book additionally included and made reference to a great deal of material I obtained from the records of other agencies of the federal government, such as the War Relocation Authority, the FBI, the War Department, the Federal Communications Commission, and the Navy Department. To the best of my knowledge, the greater part of this material, although previously available in government archives, had not been made public and was accessible only to a trained researcher and historian with special knowledge of archival sources and governmental record-keeping practices.

22. As a result of my findings in government files, I also contacted the defendants in the three wartime criminal cases decided by the Supreme Court, Messrs. Hirabayashi, Yasui, and Korematsu. In addition to interviewing them for my book, I also made available to them the more significant of the information I had discovered regarding acts of misconduct by government officials during their trials and appeals, and discussed with them possible legal action in light of this information. At the request of these defendants, and with the volunteer assistance of approximately fifteen attorneys, massive additional research was conducted and petitions for writs of error coram nobis were filed in January and February, 1983, in the federal district courts in which they had been convicted.

23. The *Korematsu* case was heard on November 10, 1983, by the Honorable Marilyn Hall Patel of the United States District Court for Northern California. Judge Patel granted the petition filed by Mr. Korematsu, find-

ing after her own independent review of the petition and of the report of the CWRIC, *Personal Justice Denied*, that the allegations of misconduct made in the petition were substantially true and that the government had made no substantive defense to the factual allegations of fraud and concealment. To the best of my knowledge, hearings in the *Hirabayashi* and *Yasui* cases are scheduled in their respective courts during January, 1984.

24. Through my extensive research and knowledge of the archival records relating to wartime actions taken against the Japanese Americans, and in particular the conduct of U.S. attorneys in the Japanese American cases, I believe that the documents I examined in the Justice Department case files, which were finally located at the INS, provide a substantially different picture of the evacuation and internment from that earlier available to the public. In particular, as described in the examples in paragraphs 18 and 19, above, these records show that the Supreme Court decisions in the wartime internment cases rested on significant evidence withheld, both at the time and until 1981, from the Court by the government in these cases, in my opinion included a knowingly false and fabricated justification for the evacuation and internment.

25. In my opinion as a scholar on this topic, the Justice Department records that had been erroneously filed and that required an intensive search by Department officials to locate constitute an essential body of evidence that was not earlier available to the public. This evidence, in sum, demonstrates that the justifications for the evacuation and internment given both to the public and the Supreme Court over the past forty years had no basis in fact.

/s/ Peter Irons  
PETER IRONS



Sworn to and subscribed before me this 11th day of  
January, 1984.

/s/ Pauline F. Cassidy  
PAULINE F. CASSIDY  
Notary Public

My commission expires 9/3/86

JWD:PJG:car  
146-35-0

March 15, 1963

Mr. George C. Cunningham, Jr.  
224 Deland Avenue  
Idialantic, Florida

Dear Mr. Cunningham:

Your letter of February 24, 1963 in which you request information relative to the detention of persons of Japanese ancestry during World War II has been referred to my attention. It appears that your major concern is with American citizens of Japanese ancestry who were evacuated from their homes on the West Coast to relocation centers and to the property losses which resulted from such evacuation.

In reply, please be informed that the United States Government sought to assist all persons of Japanese ancestry who were evacuated from their homes during World War II, with the disposition of their property through various agencies and in many instances provided them with storage facilities. Subsequently, mindful of the fact that many evacuees nevertheless suffered serious losses, the Congress, by the Evacuation Claims Act of July 2, 1948 (Public Law 886, 80th Congress, 2nd Session), authorized the Attorney General to receive and consider claims by persons of Japanese ancestry, "for loss of real or personal property, which resulted as a reasonable and natural consequence of their evacuation or exclusion from their homes." The last of the claims filed pursuant to this Act, which numbered 26,552, was settled on November 10, 1958, and brought the total amount awarded thereunder to \$36,974,240.49. A sufficient indication of the fairness with which this program was administered may, I believe, be found in the fact that only eight claimants have brought suits in the United States Court of Claims and that in seven of these eight suits the actions were necessitated by the fact that the

claimants were demanding amounts in excess of the administrative settlement limit of \$100,000,00, imposed upon the Attorney General by the Congress.

If you are as deeply interested in this matter as your letter indicates, may I suggest that there is an abundance of literature available on the general subject. In view of the nature of your questions, I would particularly recommend "The Spoilage" by Thomas and Nishimoto, University of California Press—1946, and "Prejudice, War and the Constitution" by Tenbroek, Barnhart and Matson, University of California Press—1954. You may also be interested in the "Final Report—Japanese Evacuation from the West Coast" by General J. L. DeWitt, for sale by the Superintendent of Documents, Government Printing Office, Washington 25, D.C.

I trust the above is fully responsive to your inquiry.

Yours very truly,

JOHN W. DOUGLAS  
Acting Assistant Attorney General  
Civil Division

By:

DONALD B. MACGUINNESS  
Chief, General Litigation Section

MELBOURNE HIGH SCHOOL  
1050 Babcock Street  
Melbourne, Florida  
Telephone: PA3-4151

Justice Department  
Pennsylvania Ave.  
Washington 25, D.C.

February 24, 1963

Dear Sir:

I would be very grateful if you would help me gather some information. I am doing a term paper on the treatment of the Japanese in the United States during World War II. This includes information on the internment camps that the west-coast Japanese were put into.

I have written to other sources but with negligible results. Please hurry, I am pressed for time.

Thanks again for your help.

Sincerely yours,

/s/ George C. Cunningham, Jr.  
GEORGE C. CUNNINGHAM, JR.  
224 Deland Ave.  
Indianapolis, Florida



Mar. 20, 1963

JWD:PJG:car

146-350-0

Miss Mary Jo Werts  
887 East 331 Street  
Eastlake, Ohio

Dear Miss Werts:

Your letter of March 6, 1963 to the Attorney General requesting information concerning the detention of Japanese Americans during World War II has been referred to me for a reply.

In response to your question as to the reasons why persons of Japanese ancestry were evacuated from their homes on the West Coast to relocation centers I think you will find such reasons clearly detailed in the opinion of the United States Supreme Court filed in the case of *Hirabayashi v. United States*. This opinion is set forth beginning at page 81 in Volume 320 of the United States Reports. If these reports are not available in your local Public Library I feel sure that an attorney in your city will be able to inform you where you may find such reports.

As the result of the evacuation of these persons of Japanese ancestry rather extensive property losses were incurred. The United States Government sought to assist such persons with the disposition of their property through various agencies and in many instances provided them with storage facilities. Subsequently, mindful of the fact that many evacuees nevertheless suffered serious losses, the Congress, by the Evacuation Claims Act of July 2, 1948 (Public Law 886, 80th Congress, 2nd Session), authorized the Attorney General to receive and consider claims by persons of Japanese ancestry, "for loss of real or personal property, which

resulted as a reasonable and natural consequence of their evacuation or exclusion from their homes." The last of the claims filed pursuant to this Act, which numbered 26,552, was settled on November 10, 1958, and brought the total amount awarded thereunder to \$36,974,240.49. A significant indication of the fairness with which this program was administered may, I believe, be found in the fact that only eight claimants have brought suits in the United States Court of Claims and that in seven of these eight suits the actions were necessitated by the fact that the claimants were demanding amounts in excess of the administrative settlement limit of \$100,000.00, imposed upon the Attorney General by the Congress.

Since it appears that you are extremely interested in this matter I suggest to you that there is an abundance of literature available on the general subject. In view of the nature of your question, I would particularly recommend "The Spoilage" by Thomas and Nishimoto, University of California Press—1946, and "Prejudice, War and the Constitution" by Tenbroek, Barnhart and Matson, University of California Press—1954. You may also be interested in the "Final Report—Japanese Evacuation from the West Coast" by General J. L. De Witt, for sale by the Superintendent of Documents, Government Printing Office, Washington 25, D.C.

I trust the above is fully responsive to your inquiry.

Sincerely yours,

/s/ John W. Douglas  
JOHN W. DOUGLAS  
Acting Assistant Attorney General

Mary Jo Werts  
887 East 331 Street  
Eastlake, Ohio  
March 6, 1963

Mr. Robert Kennedy  
Attorney General  
Internal Security Division  
Constitution Avenue  
Washington 25, D.C.

Dear Sir:

I am an eleventh grade student at North High School in Eastlake, Ohio. For my American History semester study I chose the Japanese Americans in World War II. Any information concerning these people would be appreciated. The type of information I need is how they were treated, the reasons why they were treated the way they were and where were the relocation camps.

Would you please send an extra copy of all the information for my teacher who is also interested in this study. Thank you very much for your help.

Respectfully yours,

/s/ May Jo Werts  
MARY JO WERTS

COMMISSION ON WARTIME RELOCATION  
AND INTERNMENT OF CIVILIANS

July 14, 1981

Hearing convened at 9:00 a.m.

Before:

JOAN Z. BERNSTEIN, Esq., Chair  
CONGRESSMAN DANIEL E. LUNGREN, Vice Chair  
HON. EDWARD W. BROOKE  
FATHER ROBERT F. DRINAN  
DR. ARTHUR S. FLEMMING  
HON. ARTHUR J. GOLDBERG  
FATHER ISHMAEL V. GROMOFF  
HON. WILLIAM M. MARUTANI  
HON. HUGH B. MITCHELL  
ANGUS MACBETH, Esq., Special Counsel

AFTERNOON SESSION

2:40 P.M.

CHAIR BERNSTEIN: The Commission will reconvene.

The first four scheduled witnesses for this afternoon are from the following departments of the government, the Department of Justice, Interior, Department of the Army, and the Department of State. Three are represented at the present time in the hearing room I believe, and if you are will you please come forward to the witness table.

I'm sorry, I don't know how to identify you. If you'd come forward and sit down then perhaps we could have you just identify yourself and then deliver your statements on behalf of your department.

I think the Department of the Interior is not here, so we may have one empty chair.



## STATEMENT OF C. WILLIAM LENGACHER

MR. LENGACHER: My name is C. William Lengacher, I am Chief Judgment Enforcement in the Civil Division of the Department of Justice. I'm administrative head of the office which assumed most of the responsibility and the personnel of the old Japanese Claims Section.

It is my pleasure to appear today before the Commission on Wartime Relocation and Internment of Civilians, to present a statement from the Department of Justice defining the historical role played by the Civil Division in the 1942 Wartime Relocation and Internment of Civilians of Japanese and Aleutians Indian ancestry.

During World War II more than 120,000 Japanese American citizens and permanent resident aliens of Japanese descent were detained, interned, forcibly relocated by the United States because the government believed this drastic step was necessary to prevent espionage and sabotage. While a small number of these people, about 2,000, were apprehended shortly after Pearl Harbor and held in custody as enemy aliens under the Alien Enemy Act, martial law, the vast majority were detained and interned because they lived too close to the west coast. They received evacuation orders issued under Executive Order 9066, dated February 19, 1942, which authorized the military authorities to designate military areas from which any person could be excluded and required military authorities to feed, shelter and transport the persons evacuated from such areas.

Additionally, nearly 1,000 Aleut Indians were relocated and interned under a similar order, because of their proximity to the war zone.

Beginning March 24, 1942, the evacuees were detained and interned at nearby assembly centers, and/ or relocation centers for periods varying between a few days and four years. While it was the policy of the War

Relocation Authority to quickly resettle the evacuees in nonrestricted areas, this process was slow. At the war's end, the centers still contained a population of over 50,000 people; the last relocation center was not emptied until the last of March 1946. Although precise figures are unavailable, we estimate that the period of detention of internment of evacuees averaged about two years.

Most of the evacuees had less than a week to arrange their affairs before they were required to leave their homes, places of business and farms with only the possessions they could carry. The government agencies which were designated to assist the evacuees in the disposition and preservation of property did not have sufficient time to institute adequate means of protecting the evacuees' interests before the evacuation began. Consequently many of the evacuees sustained property losses in various ways, such as forced sales at far less than fair market value, abandonment, lapsed insurance policies, foreclosures, theft, vandalism, arson and waste.

After the war the Federal Government recognized that the evacuees had to bear losses occasioned by their evacuation and exclusion in addition to the wartime deprivations they had shared with the rest of the American people. To alleviate to some extent the disproportionate financial burden that the Government's war measures had thrust upon the evacuees, the 80th Congress enacted the Japanese American Evacuations Claims Act.

This Act authorized the Attorney General to receive, adjudicate, and after a 1951 amendment, compromise claims submitted by eligible persons of Japanese ancestry for damages or losses of real or personal property resulting from their evacuation. This legislation specifically excluded payments for damage on account of death, personal injury, personal inconvenience, physical hardships, personal suffering, and for the loss of anticipated profits or the loss of earnings. The Act was further amended in 1956 to permit payment of compensation to a designated group of Japanese alien enemies who were excluded from coverage under the original act.

The evacuation claims program commenced on July 1, 1949. Evacuees had 18 months from that date in which to submit claims. The Japanese Claims section in the Civil Division was established to process and litigate those claims. When this program was concluded with the last award on November 10, 1958, the Department had received 26,568 claims and awarded \$36,974,240 for settlements to the claimants.

I'm not prepared to answer any questions at this time. The Department of Justice, will, however, respond to any written questions submitted by the Commission.

CHAIR BERNSTEIN: Thank you.

COMMISSIONER BROOKE: Madam Chairman, might I just ask this—no question on the subject on the matters you discussed, but what was the source of your information? Is it Justice Department files?

MR. LENGACHER: The files are in the custody of the Judgment and Enforcement Unit of which I'm the administrative head; and I studied those files over the five years that I've headed up the Judgment and Enforcement.

COMMISSIONER BROOKE: You did the research there yourself?

MR. LENGACHER: Yes, sir.

COMMISSIONER BROOKE: And that formed the basis of your report?

MR. LENGACHER: Right. My predecessor was a chief of the old Japanese Claims Section, and he kept extensive records of the whole Japanese Claims program.

COMMISSIONER BROOKE: Dating back to the date of the executive order?

MR. LENGACHER: No, sir; dating back to the Japanese Evacuation Claims Program, which began in 1948.

COMMISSIONER BROOKE: And not prior thereto?

MR. LENGACHER: No, sir.

COMMISSIONER BROOKE: If we were looking for an opinion of the Attorney General to the President in 1942, you don't have any knowledge that we could find it in your files?

MR. LENGACHER: No, sir; I confined my comments to the Civil Division.

COMMISSIONER BROOKE: Dating from 1948?

MR. LENGACHER: Yes, sir.

There were other divisions that were involved with 9066; the FBI and Immigration and Naturalization Service, the U.S. Attorney's offices.

COMMISSIONER BROOKE: Thank you, Madam Chair.

CHAIR BERNSTEIN: Thank you very much.

COMMISSIONER GOLDBERG: May I ask one question?

When the Attorney General sends an opinion to the President of the United States, is that opinion then published as an opinion of the Attorney General?

MR. LENGACHER: Yes, sir; I believe they are.

COMMISSIONER GOLDBERG: And therefore, if the Attorney General sent a communication to the President in 1942 in reference to an executive order issued then, 9066, if the Attorney General of the United States had sent an opinion to the President, it would appear in the publication of the Department of Justice, wouldn't it?

MR. LENGACHER: I really don't know your answer. I would imagine so but—

COMMISSIONER GOLDBERG: Then in following Senator Brooke's question, does not the Department of Justice—and I've heard what you said. Does not the Department of Justice maintain records going way back, back to '42?

MR. LENGACHER: I can speak for the Civil Division, I do not know that the Department of Justice has extensive records relating to the individuals who were removed from the west coast and excluded from the west coast, there are many records in the archives under our jurisdiction.

COMMISSIONER GOLDBERG: Then I have a question to ask, then why does not the Department of Justice since this Commission authorized under the act of Con-



gress has asked for a complete report from the Department of Justice as to its role, why do they transfer it to you who are not responsible, obviously. Is there not someone in the Department of Justice, historian, or someone who can give us a comprehensive report so our commission can fulfill its statutory mandate?

MR. LENGACHER: I'll certainly ask that when I go back.

CHAIR BERNSTEIN: I think it's a bit unfair to ask Mr. Lengacher to respond to that, Mr. Goldberg. I think we will need to follow up with the Department, perhaps after today's hearing, to see whether we don't need to have more complete reports from other parts of the Department.

Thank you very much, Mr. Lengacher.

Mr. Fred Beck, of the Department of the Army.

#### STATEMENT OF FRED BECK

MR. BECK: Thank you Madam Chairman, gentlemen, the Commission.

I've been asked to comment briefly on the role of the Armed Services in the evacuation of the Japanese population from the west coast during the first year of World War II. Although I speak today for the Department of Defense, the events in question occurred at the direction of the War Department, the forerunner of today's Department of the Army.

The War Department's part in what remains today a dark interlude in American history was the central if not overriding one. The relocation of the Japanese has been variously attributed to purely political and economic expediencies fuel by pre-war racial tensions coming to a head in a post Pearl Harbor hysteria.

There's no argument that the Army was the single agent that formulated the instruments that gave the relocations the force of law and administered their execution. There is also no doubt that those measures, justified

on the basis of military necessity alone, were immensely popular among a largely hostile citizenry.

The Army's defenses on the west coast in 1941 were an aggregate of the 9th Corps Area, which was a peacetime administrative structure, and 4th Army, a tactical unit with no troops assigned until after Pearl Harbor.

In June 1941, responding to increasing tension over Japanese expansion in Asia, the War Department established the Western Defense Command, superimposed over these previous commands. Responsible for all of this and wearing three hats, as we say, was Lt. General John L. DeWitt, a 61 year old veteran of World War I, Philippine duty and several high level Army assignments. DeWitt's areas also included all of the territory of Alaska, where he had already begun a belated improvement of the defenses in 1939.

Within this area also was the bulk of the Japanese minority then living in the United States. In 1940, of a total of 126,947 Japanese in the country, 112,353 were in the west coast states, 93,717 in California alone. The victims of exclusionary immigration laws, some 40,869, or 43.5 percent, were resident aliens called Issei.

In July 1941 the War Department and the Federal Bureau of Investigation agreed to leave to the FBI control of the aliens if war came. The FBI also received military and naval intelligence reports on Japanese espionage identified in the western hemisphere, and surveillance reports of such martial organizations as the Black Dragons, and a quasi-criminal network known as the Tokyo Club.

Although military and domestic intelligence agencies paid special attention to the Kibei, that group of American of Japanese ancestry who went to Japan for an education, no intelligence service made plans for mass evacuation of Japanese population before the war, and all of them resisted that idea after Pearl Harbor. German and Italian alien suspects were also marked for detention. In Hawaii, with a population of 500,000, 160,000, or 32 per-

cent, were of Japanese extraction, constituting a major part of the island's economic base. Alaska, by comparison, had a miniscule alien population. In the context of the time, when the breathtaking German conquest of Western Europe in 1940 was regarded as heavily abetted by fifth columnists, 1,100,000 registered aliens in this country had emigrated from countries hostile to the United States in World War II, and at least some of them could be regarded as potential saboteurs.

The Japanese attack at Pearl Harbor produced immediate effects on the western mainland. From a purely military organizational standpoint, one development had a bearing on the treatment of all civilians in the area. On the 14th of December 1941, the War Department made the Western Defense Command a theatre of operations, giving General DeWitt yet another hat: he now commanded a war zone.

According to the field service regulations in force at that time, the theatre was organized for tactical and administrative control, and was designed for offensive action. To sharpen an understanding of this particular military usage, I might add that when General Eisenhower took the war to the Germans in November 1942, he commanded the North African Theatre of Operations, General MacArthur commanded the Southwest Pacific Area, another theatre; and the Normandy invasion and the defeat of Hitler took place within the European Theatre of Operations. The theatre commander must ensure the security of all of his lines of communication and he can, and in World War II overseas he generally did provide a theatre staff element devoted entirely to planning for the welfare, the employment, and, where necessary, the control of civilians. This staff element was designated G-5; its military government functions also included the apprehension of known civilian agents of the enemy. In short, from a purely military outlook, the presence of the Japanese population in the western theatre of operation would have occupied, to some degree, the

attention of any other theatre commander even if he did not harbor the particular feelings on the Japanese race that General DeWitt did. The Eastern Defense Command, for instance, headquartered in New York, had the same difficulty with German and Italian residents, aliens, but never resorted to the measures that were practiced in the West.

Immediately after Pearl Harbor, the detention by the FBI of suspect alien individuals, as individuals, went with reasonable dispatch everywhere, including in the Western Defense Command. Only afterwards did the sequence of decisions unfold that concluded with the internment of all Japanese, even those who were American citizens.

In the single month after the attack, public anti-Japanese opinion in the West began reaching fever pitch. General DeWitt favored moving all aliens to the interior and also favored enhanced powers for the Justice Department to conduct raids on suspects in accord with Presidential proclamation on security, Executive Order 8972 of 8 December 1941. But he was adamant in his opinion that the already prevalent suggestion for interning naturalized Japanese and citizens was unnecessary. He repeatedly represented this in his telephone calls to Major General Allen V. Gullion, the Army's Provost General in Washington, who himself wanted to transfer the West Coast Alien Control Program to the War Department.

To coordinate War and Justice Department activity, Gullion sent the chief of his Alien Division, at that time Major Karl K. Bendetsen, to San Francisco in early January 1942 for consultations.

Bendetsen, a lawyer on active duty for only one year at that point, was to become the central figure in the mass evacuation scheme. At the January meetings, he originated the system of strategic zones and recommended passes and permits. After the Justice Department, on the 9th of February, admitted that it could not handle the



proposed alien evacuation from 99 strategic areas named by General DeWitt, the War Department in essence moved to take over alien control.

On February 14th, amid what was by now an anti-Japanese hysteria, DeWitt petitioned the War Department for a Presidential executive order empowering him to exclude either citizens or aliens from designated military areas. By 19 February 1942, General Gullion had a draft of the order staffed through the senior levels of the War Department, obtained reluctant Justice Department concurrence, and had the President's signature on what was thereafter known as Executive Order 9066.

This order enabled a military commander, delegated through the Secretary of War, "to prescribe military areas in such places and of such extent as he . . . may determine, from which any or all persons may be excluded . . ." On the 21st of March Gullion's draft legislation, adding legal sanctions to the order, passed Congress as Public Law 503.

A War Department memorandum of the 20th of February gave DeWitt further instructions on how to classify individuals and emphasized the voluntary nature of the exodus once the uprooted persons had moved from the restricted areas.

In March 1942 General DeWitt began issuing a series of public proclamations based on his new authority. On the 2nd of March he established military areas Number 1 and Number 2, no longer attempting to delineate single sometimes overlapping strategic areas. Number 1 was a strip averaging 150 miles wide down the coast from Canada to Mexico, and taking in all of southern California.

Area Number 2 paralleled the first and encompassed the eastern region of the three coastal states. Acting on earlier Justice Department orders of the 4th of February and earlier, which established curfews and regulations for permanent changes of residents, and with the

establishment of the military areas, some 4,889 Japanese voluntarily migrated.

Proclamation Number 4 of the 27th of March 1942 was the forerunner of forced evacuation. It froze all further movements in both military areas.

Proclamation Number 7, on the 8th of June, then excluded all persons of Japanese ancestry, alien or non-alien, from Area Number 1. To handle this new development, DeWitt on the 11th of March established a civil affairs division, G-5, in his command, and the following day also established an executive agency, the Wartime Civil Control Administration. Both of these new entities were head [sic] by Karl Bendetsen, who came from Washington, now a full colonel.

Concurrently, evacuation began through the publication of exclusion orders, 108 of them in all, which named specific localities in which Japanese inhabitants were isolated, gathered into assembly areas, and then assigned to one of ten relocation centers for the duration of the war. With the exception of Rohwer and Jerome in Arkansas, all of the sites were in desert environments with extremes of climate. Manzanar and Tule Lake were in California; and the latter was the center for those under heavy suspicion or those who answered questions about their loyalty incorrectly or not at all. Minidoka was in central Idaho; Heart Mountain near Cody, Wyoming; Topaz in Utah; Gila River near Phoenix; Poston near the California border; Granada in southeastern Colorado. For all of these movements, the Army provided medical staff and an armed military police escort.

By the command's count, it had moved 110,442 evacuees who eventually received in government settlements on their property claims valued over \$400,000,000, only \$38,474,140 or about 10 cents on the dollar.

The War Department further involved the Corps of Engineers in constructing all the necessary shelter and facilities at the camps. In each camp, the Western Defense Command turned over its charges to the War Re-

location Authority, a civilian agency established on the 18th of March by Executive Order 9102, to run the relocation centers.

On the 22nd of November 1942, the Western Defense Command turned over all formal responsibility to the War Relocation Authority but it did not relinquish all control. The Army still supplied the military police who quelled several notable disturbances in the centers and escorted anyone travelling outside. It administered loyalty tests, and it recruited in those camps after 1943 the men who joined the 442nd Regimental Combat Team, whose exploits in North Africa and Italy are legend.

For General DeWitt, his theatre rear areas now unencumbered by the threats of fifth column activity, the Western Defense Command returned to face the Japanese air attack that he had awaited since December. It never came.

CHAIR BERNSTEIN: Does that complete your statement, Mr. Beck?

MR. BECK: Yes.

CHAIR BERNSTEIN: Thank you very much.

We will continue the order of our questioning.

COMMISSIONER MARUTANI: There are several questions that I would like to ask. First of all, could you give us your position?

CHAIR BERNSTEIN: Would you give us your title?

MR. BECK: Yes, I'm the Executive of the Historical Services Division, United States Army, Center of Military History.

COMMISSIONER MARUTANI: And could you state for me what the thesis of your presentation is? I'm not quite clear. Does it have a thesis at all?

MR. BECK: I did not start out to put a thesis to it, however I think the facts will speak for themselves that at this date the Army perhaps takes no pride in this particular event, there's no way to put a clean shirt on it.

COMMISSIONER MARUTANI: Well, what troubles me, if you purport to report facts, is the way you've presented them. To be quite candid with you, at one point you referred to enemy aliens on the east coast, the Germans and so forth; and then the transition was made over to the west coast as if we were talking about the same type of people, when we're talking about United States citizens, not enemy aliens any more but you sort of lumped them together and therefore what is good for the goose on the east coast, that is the German aliens and Italian aliens, who elected apparently not to take out United States citizenship, whereas over on the West Coast it was prevented by the 1924 Act from doing so, and therefore they end up being enemy aliens, but again they are, a goodly percentage of them, are United States citizens; and then I guess with the enemy aliens you would include women and babies, because they were all removed.

This is the kind of transition that I find a little troubling if your report is a factual report.

MR. BECK: The paradox I was trying to draw of course is that in the Eastern Defense Command, which was a theatre of operations in the same way as the Western Defense Command was, there were no mass evacuations, alien suspects were rounded up by the Justice Department according to plan. This makes the events in the Western Defense Command stand out all the more startling.

COMMISSIONER MARUTANI: Well, you also refer to alien and non-alien Japanese, Japanese ancestry individuals, alien and non-alien. What is a non-alien?

MR. BECK: That was General DeWitt's particular usage.

COMMISSIONER MARUTANI: Yes, but what is "non-alien"?

MR. BECK: A citizen.

COMMISSIONER MARUTANI: Why can't we say "citizen." I mean, let's call a spade a spade; and let's stop using these evasive terms, and they are evasive.



See, I'm not a non-alien, I'm a United States citizen bona fide, and these people here in this room are citizens, not non-alien.

And then the other thing that I noted is you spoke of military escorts. They weren't escorts. An escort is to protect you. I think they were more guards, weren't they, to make sure you wouldn't get away.

MR. BECK: Yes, oh certainly.

COMMISSIONER MARUTANI: You might say this is quibbling with words, well, it may be, but again I do want to amend your report if it is supposedly factual, that we do not use these terms about armed military escorts, when in fact they were guards watching over the people to make sure they wouldn't go, or went where they didn't want them to go.

I'm sorry about that, but I did want to direct your attention.

CHAIR BERNSTEIN: Senator Brooke?

COMMISSIONER BROOKE: Mr. Beck, I concur with Judge Marutani's distinctions, and I think you do as well.

But I want to commend the Army for what appears to be a scholarly research work, better than I think we've heard to date. And I just want to go over one matter with you which does not seem to conform with some of the testimony we've heard.

According to the Army records here, and correct me if my sequence is wrong, that this evacuation scheme as you put it, was initiated by General DeWitt, and it was sent to General Gullion, and the Army Chiefs of Staff presumably in Washington, they made their presentation to the Justice Department as well, and to the President of the United States; and that the Executive Order 9066, which was issued by the President, was issued after reluctant acquiescence by the Justice Department, is that correct?

MR. BECK: Yes, sir.

COMMISSIONER BROOKE: Now, what documentation do you have to support that there was acquiescence or agreement, however reluctant, by the Justice Department?

MR. BECK: There's an account of a meeting among General Gullion, a number of other members of the War Department, and Provost Marshal General's staff, and members of the Justice Department, including Attorney General Biddle. I believe Mr. Rowe was there, and Mr. Ennis, on the 17th of February, two days before the actual issuance of the executive order.

The Justice Department members, when they heard the rendition of the draft that General Gullion read, were at first amazed, and the attendees later, one of them at least, testified later that Mr. Ennis—that's the only identification I have of him—was close to tears at the end of this meeting because he couldn't believe the contents of the executive order.

At the time, the military necessity argument overrode just about everything else. No one was willing to argue at great length with that particular presentation of the strategic situation, although as I think General Clark may tell you later on today, the situation was not as serious as it was being made out. Yet in that climate, the executive order passed and was signed by the President.

COMMISSIONER BROOKE: Does your record reveal any participation on the part of Secretary Stimson?

MR. BECK: Secretary Stimson in his memoirs, after the War, published in 1946 and edited by McGeorge Bundy, revealed that he knew and certainly was party to the decision-making process that brought this out; and he too again cites the argument from military necessity.

COMMISSIONER BROOKE: Did Secretary Stimson agree to the executive order as drafted?

MR. BECK: Well, yes, he concurred in it.

COMMISSIONER BROOKE: Did he concur reluctantly?

MR. BECK: I don't have an adverb to describe his actions, sir, I'm sorry.

COMMISSIONER BROOKE: Does your record indicate Secretary of the Interior Ickes' participation?

MR. BECK: On Ickes' role, no, sir; I have no information.

COMMISSIONER BROOKE: But at any rate, we do know from your records that General DeWitt initiated, he went to the high command in Washington; they reviewed it, Justice reviewed it, and then the recommendation was made to the President to issue the executive order, is that correct?

MR. BECK: The sequence is probably a little more complex than that. Opinion was already coagulating in the War Department for some time in favor of a wholesale, that is, citizens and aliens alike evacuation.

General DeWitt, for his part on the west coast, was subjected to the hysteria that had broken out there beginning roughly in January, and then further was exacerbated by the release of the Roberts report which claimed that there had been much Japanese espionage and sabotage at Pearl Harbor. This induced a wave of anti-Japanese hysteria on the west coast.

What does exist are records of telephone conversations between General DeWitt and General Gullion, in which you can see the rising tension on this accord, on that matter. At both ends of the telephone line opinion is solidifying in favor of this mass evacuation. And these records still exist.

COMMISSIONER BROOKE: Would you supply for the record citations to records and documents that you used in your research to arrive at the conclusion that you have presented to us this afternoon?

MR. BECK: What I used to construct this was mainly secondary resources and accounts of the whole affair, both official and unofficial. Since the time was short I did not have time to get into the actual records.

Those I recommend to the Commission staff and will make them available to you.

COMMISSIONER BROOKE: You say telephone conversations. You must have some record of those telephone conversations.

MR. BECK: Well, these are cited as well in various secondary sources to demonstrate what General DeWitt's mind was and how the planning was going in the War Department.

COMMISSIONER BROOKE: Will you make that available to the Commission?

MR. BECK: Yes. These are in published sources and are available through either the Library of Congress or—

COMMISSIONER BROOKE: You'll get us a citation?

MR. BECK: Yes, certainly.

COMMISSIONER BROOKE: One further question: Were there any groups that were adding fuel to the flames and arousing these anti-Japanese sentiments and hysteria which has been referred to in your testimony? Such as to name one, the type of organization like the Ku Klux K'l'n. Did you have organizations to contend with in 1941 and '42 that were whipping it up and getting people into a frenzy which created this climate?

MR. BECK: Well, the most notorious, the one I have seen cited the most frequently is something called The Native Sons and Daughters of the Golden West, I believe.

COMMISSIONER BROOKE: That was one. Do you have any others?

MR. BECK: It's necessary to say that the others were not necessarily hate groups as such as we define them today, but the legitimately constituted authorities within local counties, for instance, the Los Angeles Chamber of Commerce, various trade and agricultural associations on the west coast.

COMMISSIONER BROOKE: Economic groups primarily?

MR. BECK: Yes.



COMMISSIONER BROOKE: More than racially, they were economic?

MR. BECK: Yes, sir.

CHAIR BERNSTEIN: Father Gromoff?

COMMISSIONER GROMOFF: Do you recall the Department of the Army's role in the evacuation and resettlement of the Aleuts during World War II?

MR. BECK: I did not mean to gloss over them and indicate that it did not happen, but I have not had much access to secondary material that discusses the Aleuts. I am aware that the Pribilof Islands were evacuated, particularly the Island of St. Lawrence, in the interest of putting out there a military intelligence team which was to conduct radio intercept, and whatever other observations it could of Japanese movements in the Pacific.

There were two other islands that were inhabited, and I'm not sure of the timing or the extent of the evacuation of those populations.

The Japanese populations and the Aleuts from Alaska generally were also brought to the relocation centers in the contiguous 48 states. But these records will also exist in the Alaska Defense Command or the military records emanating from those geographic locations in Alaska.

COMMISSIONER GROMOFF: The Aleuts were relocated because of General DeWitt?

MR. BECK: Until 1943, when the Alaska Defense Command was established, General DeWitt controlled those areas, and so his writ extended to Alaska. The policy that was prevailing in the western states also extended there.

CHAIR BERNSTEIN: Further questions?

COMMISSIONER GOLDBERG: May I commend you very much on your statement, particularly the honesty and candor that you have displayed. I refer to this specifically and I want to read from your statement, you speak for the Department of Defense because now the War Department is dissimulated, so I want to read:

"The War Department's part in what remains a dark interlude in American history was the central, if not overriding one," and your study as historian, I presume, from secondary and other sources, I assume, establish what you have said.

MR. BECK: Yes, sir.

COMMISSIONER GOLDBERG: And I must say that this is the first of all the governmental witnesses that we've heard that has said that plainly and forthrightly. That does not mean there's no explanation for it. War had broken out and the whole country was concerned, as you said, there was a good deal of public hysteria, but I do commend you for a very forthright statement in that respect.

MR. BECK: Thank you.

COMMISSIONER GOLDBERG: I do have one question to ask you. I would like to ask you something now which perhaps you can't answer now, and you may want to look at your records to establish it so you can send it to the Commission.

I presume that as a low ranking major in World War II, that even when generals are involved, they must go through the chain of command in the Army. Is that not your experience as a historian?

MR. BECK: Yes, sir; that's the normal procedure.

COMMISSIONER GOLDBERG: And therefore, it would be normal, even with General Gullion, the Provost Marshal, if he were to authorize an evacuation of 110 to 120,000 American citizens, it would require, under our Constitutional frame, approval as Senator Brooke has indicated, by Secretary of War, or by Assistant Secretary McCloy, or some civilian who would be the ultimate authority. Am I correct on that?

MR. BECK: The line would lead up through the military chain to a civilian, yes.

COMMISSIONER GOLDBERG: So that no general by his own authority, General DeWitt, General Gullion, could say we're in danger, and it wasn't a theatre of

actual military operations for a general to have much more authority; it was best a threatened potential worrisome problem. This being the case, to take that basic decision would have required authorization, am I wrong about that from my recollection of World War II? In my brief experience in the Armed Forces?

MR. BECK: At the War Department level, the general staff is after a planning organization. What it would produce would be any number of different schemes or courses of action which may lay around in states for years until an event triggers their use.

COMMISSIONER GOLDBERG: Sure.

MR. BECK: Once that—once the situation demands that a plan be called up and put into effect, it would normally be updated; the Chief of Staff at that point would definitely be involved in it, especially if it involves any impact on a civilian population; possibly the White House would be the next thing in line, if it involves a political issue.

COMMISSIONER GOLDBERG: And doesn't your reference to telephone conversations and so on,—did your study show what I read in the published material, these secondary sources, that the Secretary's office was very importantly involved through Assistant Secretary McCloy?

MR. BECK: Yes.

COMMISSIONER GOLDBERG: And that no one, as I have said, no general on his own would take 110 or 120,000 American citizens and evacuate them. That would require concurrence on a civilian level, under our constitutional—

MR. BECK: Very definitely.

COMMISSIONER GOLDBERG: Isn't that so?

MR. BECK: Yes, even in wartime.

COMMISSIONER GOLDBERG: Well, again, I want to commend you, because I regard it to be—I can only speak for myself as a member of the Commission, I think it is quite salient that all of us in the Government,

and I served in many capacities, that in the Government, if a mistake has been made and it's due to understandable or not understandable wartime problems, that we frankly say it was a terrible mistake, it's a dark chapter in our history.

You have done that and you are entitled to great commendation.

CHAIR BERNSTEIN: Commissioner Mitchell?

COMMISSIONER MITCHELL: At the end of the line here, most of my questions have been answered, but I'm wondering whether it would be fair to capsule your testimony as saying that Colonel Bendetsen originated, General DeWitt petitioned, General Gullion drafted, and the President signed.

MR. BECK: That would be the sequence. But there is a good deal more detail in the story, and it takes place over so much more time.

COMMISSIONER MITCHELL: But basically the War Department was essentially responsible?

MR. BECK: For that sequence of events, yes.

COMMISSIONER MITCHELL: Is it not true that there was a conference—did you read that secondary source, where Gullion and the Department of Justice and everybody was present—

MR. BECK: Yes.

COMMISSIONER MITCHELL: And Gullion pulled out the executive order and then it was worked on, the Department of Justice participated and so on, and then approved by either Stimson, McCloy, wouldn't that be about right?

MR. BECK: Yes, that was the meeting of 17 February.

COMMISSIONER BROOKE: Was Biddle present at the meeting?

MR. BECK: I believe he was, and as I said the Justice Department concurrence was very reluctant.

COMMISSIONER MARUTANI: If I may just switch over to the Alaskan situation as to the Attus and the



Akutans and on Kiska. You removed, I believe, the Army did evacuate the Aleuts along those islands, but did they not also leave people behind?

MR. BECK: Now that's something I've not had a chance to do much research into. There the threat of an actual invasion of course—

COMMISSIONER MARUTANI: As a matter of fact the Japanese had, I believe, attempted to land on Attu at the time, this was in June of '42.

MR. BECK: Yes, and did, and bombed Dutch Harbor.

COMMISSIONER MARUTANI: You have not run across the evidence as to whether or not when they removed the Aleuts that they in fact did leave people behind on Kiska and perhaps on Attu, but on Kiska?

MR. BECK: The published works that I've been able to use have not referred in great detail to that area of the world, but I'm sure the story exists in the documents and we have not had a chance—

COMMISSIONER MARUTANI: I might add, I have come across some information that fact non-Aleuts did remain back in Kiska, and so this raises some question as to exactly what the Army's purpose was in the evacuation.

COMMISSIONER GOLDBERG: This thought occurs to me. We have had much testimony that there was no disloyalty established about the 110 or 120,000 Japanese Americans. From your historical record, was any evidence offered about any disloyalty on the Aleuts?

MR. BECK: There again I have no information. The general statement was there was never a proven instance of disloyalty among these elements at all.

CHAIR BERNSTEIN: Mr. Beck, I join with my colleagues in commending you for an outstanding statement. As you know, this is the initial hearing of this body and the beginning of our inquiry; I will and I know my colleagues will appreciate your continuing to work with our staff in the examination of documents, and I would hope that as we move toward our field

hearings and so forth we've discussed the possibility of a subsequent Washington hearing, and we would hope that you would again be available to join us.

COMMISSIONER BROOKE: Madam Chairman, could you ask Mr. Beck if he could look into his records and ascertain if there is a record of any uprisings, any possible atrocities, anything that occurred in those camps, because I think Mr. Beck testified that even though WRA had at one time jurisdiction over the Army, it never did relinquish control, and I think—

MR. BECK: Yes, the War Relocation Authority ran the camps although there was a local government within the camps. In a few notable instances there were outbreaks of violence, what you would call a civil disturbance. The War Relocation Authority then called in two battalions of military police, who put down the riot and kept control—this was Tule Lake—for about two months until the situation was quiet again, and then they restored the authority to the War Relocation Authority.

COMMISSIONER BROOKE: Any recorded instances that you might have or any claims made during that period of time should be recorded. I would think.

CHAIR BERNSTEIN: Since I would assume that you will be responsive to that kind of request.

MR. BECK: Yes. For claims made as a result of those things would have proceeded up through a Justice Department channel.

CHAIR BERNSTEIN: Right, and we understand, I think Senator Brooke is describing, rather, documents and records that exist as to the role of the War Department in these events.

MR. BECK: Yes, I can at least point you to individuals who would be in authority over those records right now, and those in my office I can make available as well.

CHAIR BERNSTEIN: Fine. Thank you very much.

MR. BECK: You're quite welcome.

CHAIR BERNSTEIN: Our next witness is Mr. David Trask from the Department of State—Dr. Trask,

excuse me. Dr. Trask will you give us your title at the Department, please.

#### STATEMENT OF DAVID TRASK

DR. TRASK: Madam Chairperson, members of the Commission, my name is David Trask, and I'm the Historian of the Department of State. As such I direct the activities of the Department's Office of the Historian. Here with me today is Dr. Neil Petersen, who is our advisor on research, and who had great deal to do with preparing our report.

I might say that it's not often that on one occasion the Department of State outranks both the Department of Justice and the Department of the Army.

CHAIR BERNSTEIN: We're glad for you.

DR. TRASK: It's a pleasant but short life event. I'm here to report on the initial findings of the . . . .

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#### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 83-750

WILLIAM HOHRI, *et al.*, PLAINTIFFS

*vs.*

UNITED STATES OF AMERICA, DEFENDANT

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#### AFFIDAVIT OF AIKO HERZIG-YOSHINAGA

DISTRICT OF COLUMBIA ) ss

AIKO HERZIG-YOSHINAGA, being duly sworn, deposes and states as follows:

1. My name is Aiko Herzig-Yoshinaga. I have conducted extensive archival research regarding the factual circumstances underlying United States government actions against Japanese Americans during World War II. My knowledge of archival procedures, indexing, and record-keeping derives from past employment experiences, including archival responsibilities for a Special Services library of the United States Occupation Forces in Japan, the American Social Health Association, and the United Church Board for Homeland Ministries.

2. When the Commission on Wartime Relocation and Internment of Civilians was established in 1981, I joined its staff as an archival researcher. My duties for the Commission included instruction of researchers on methods of archival research, establishment of priorities for research, contacting various Department officials to locate and procure records of their respective agencies for the period under study, identifying witnesses to testify at the



Commission hearings, and review, filing, and indexing of the documents obtained.

3. Documents pertaining to U.S. wartime actions against Japanese Americans are very difficult to research because they are not in any one or even a few locations, but are spread out over numerous libraries and depositories across the country. I or persons under my supervision have examined records or obtained documents through personal examination or by telephone or mail from the following institutions:

Federal Archives and Records Center, Laguna Niguel, CA

Federal Archives and Records Center, San Bruno, CA

Federal Archives and Records Center, Suitland, MD  
National Archives and Records Center, Washington, D.C.

Huntington Library, San Marino, CA

Library of the University of California at Los Angeles, CA

Bancroft Library, University of California, Berkeley, CA

Bancroft Library, Earl Warren Oral History Project, Chicago, IL

Sterling Library, Yale University, New Haven CT

Cornell University Library, Ithaca, NY

Franklin D. Roosevelt Library, Hyde Park, NY

George Marshall Research Library, Lexington, VA

U.S. Naval Historical Center, Washington, D.C.

Center for Military History, Dept. of Defense, Washington, D.C.

Department of Army (Judge Advocate General), Arlington, VA

Pentagon Library, Arlington, VA

Library of Congress, Washington, D.C.

Library of the Executive Office of the President, Washington, D.C.

4. The libraries listed above do not always have accurate records as to the location of particular documents, causing expensive and fruitless searches for even the most diligent of researchers. For example, certain Naval intelligence (ONI) reports are very important to the issue of the nature of the threat of espionage and sabotage, since this threat was the articulated reason for the orders removing Japanese Americans from the West Coast. The U.S. Naval Historical Center informed me that these records were at the National Archives; the Archives denied this and suggested the records might be at the Federal Records Center at either Laguna Niguel or San Bruno, both in California. When I personally traveled to California to review these files, my search was fruitless. Upon my return to the Washington, D.C., area, I was informed that a recent large shipment of records had just been sent to California and that the records I sought might be in that shipment. To date, after logging many miles, hours and dollars in this search, I still have not been able to review these important documents.

5. Another problem of major proportions to researchers is the complete lack of any detailed or uniform indexing system to access documents in the many locations. Each of the numerous agencies and governmental components involved in the wartime actions has different codes and indexes for their respective documents; few have any means for cross-referencing to other agencies' files, and some have *no* index whatsoever for accessing major files of documents pertaining to this subject. A sampling of the agencies whose files contain pertinent documents include:

War Department (including files of the Western Defense Command, Secretary of War, Assistant Sec-

retary of War, General and Special Staff, Provost Marshal General, Judge Advocate General, and Military Intelligence Service)

Executive Branch

Navy Department

Interior Department

Agriculture Department

Justice Department (including FBI and INS)

State Department

Federal Reserve System

Federal Communications Commission

War Relocation Authority

Farm Security Administration

Treasury Department

Office of Strategic Service

Supreme Court

Congress

6. Over the years internal government documents have only slowly been declassified for the public. Much of my current archival research brings me in contact with still-classified material, for which I must request review and declassification. Additionally, even forty years after the operative events, some agencies, the FBI in particular, still make substantial deletions from documents so that entire pages of intelligence information pertinent to researchers' efforts are "browed out," making substantiation of intelligence reports very difficult. Further, pertinent documents regarding the wartime actions have been withdrawn by agencies in recent years for unknown reasons and thus are inaccessible; in certain FCC files, there are sometimes more documents withdrawn than remaining.

7. Former government officials who have personal knowledge of the basis for the wartime actions have not

been particularly helpful in providing information to researchers and historians, other than that which was publicly available at the time of the various actions. Most interviews of these officials took place when limited availability of internal government documents did not permit inquiry into new areas, nor information to provide follow-up questions or rebuttal to statements made by these officials.

8. Current governmental officials responsible for information pertaining to the wartime actions have made little or no effort to cumulate or review the original documents in their control, or to determine the factual basis for the government's wartime actions. Both public and governmental inquiries about agency records and actions have been stymied by this lack of information and cooperation.

9. Many agencies, particularly FBI, DOJ, and INS, have not yet transferred many files to the National Archives for public accessibility. Their records have been accessible only in recent years by dogged persistence of researchers via such measures as Freedom of Information Act and Privacy Act requests. The lack of detailed indexing systems and the agency's own lack of knowledge of their own holdings makes this a very cumbersome, time-consuming, and haphazard means of research. The important recent information of coverup and concealment in the DOJ files, for example, was filed in the wrong agency, and was not even known to exist by those agency officials.

10. Even though early publications exist about the wartime actions, many of those historians failed to give adequate citations for documents they rely upon, and it is not clear whether previous researchers actually reviewed the cited document, or whether they relied on oral testimony or cross-references regarding the purported existence and content of those documents. For instance, Grodzins mentioned a memo in early 1942 from attorneys Cohen, Cox and Rauh to Attorney Biddle, which may



have influenced Biddle's thinking on the legality of proposed government actions against Japanese Americans. I looked for this document for almost two years. The document was not part of Grodzin's research papers at the Bancroft Library. I finally found it, inadvertently, loose in DOJ files without proper filing or identifying information.

11. Some documents appear to have been purposely destroyed by the government during the wartime years as a means of eliminating evidence of decisions and circumstances underlying these actions. I discovered in the National Archives the only surviving known copy of the original version of the "Final Report: Japanese Evacuation from the West Coast, 1942," which was the War Department's official apologia for the wartime actions and foundation for factual claims of military necessity made to the Supreme Court. Along with that original version I found documents attesting to the recalling of all other copies and the "burning of the galley proofs, galley pages, drafts and memorandums" pertaining to the original version of the Final Report. These documents were apparently altered to hide the existence of the original version, due to substantive changes made in the military commander's justification for the wartime actions, apparently for purposes of influencing pending Supreme Court decisions.

12. The massive cumulation of documents and evidence in very recent years, including the extensive work of the Commission, has uncovered major new evidence in areas where there has been no previous publication, to the best of my expertise and personal knowledge. Some of these newly uncovered facts include:

A. Pre-World War II documents to and from the President and top Navy Department officials, including Exhibits A and B to the Amended Complaint, regarding plans to put persons of Japanese ancestry into concentration camps in preparation for possible war with Japan.

B. A May 3, 1943 statement by the Assistant Secretary of War to the Assistant Chief of Staff, Western Defense Command, that "there no longer existed any military necessity for the continued exclusion of all Japanese [sic] from the evacuated zone," and acknowledgement by these officials at the same time that "there was never any military necessity [to] justify the existence of military area coincident with each relocation center." See ¶ 87, Amended Complaint.

C. The destruction and alteration of the original printed version of the "Final Report." See ¶ 11 herein and ¶ 97 of the Amended Complaint. Also recently discovered the admission of the Commanding [sic] General of the Western Defense Command to the FCC on September 17, 1942 that "It is true that . . . none of the reported suspicious [radio transmissions] stations have proven to be enemy, clandestine, or illegal," even though he later included as justification for the military actions in the "Final Report" claims of numerous instances of illegal radio transmissions by Japanese Americans during this same time period.

D. The Justice Department attorneys' discovery of material misstatements of fact and suppression of evidence in the Final Report, disputes between the Justice and War Departments about disclosure of the true facts to the Courts, and ultimate misrepresentations and concealment of evidence before the Supreme Court, and efforts to delay, moot, and interfere with attempts to seek judicial review of the government's actions.

E. The War Department's secret detail of its personnel and contribution of classified documents to the California State Attorney General's Office, to assist in that state's amicus brief to the Supreme Court regarding alleged military justification for the wartime action.

F. Extensive preparations by the War Department to have available proposed legislation to suspend the writ

of habeas corpus for Japanese Americans interned in the United States, in the event of successful court challenges to the government's wartime actions.

13. Based on my research efforts, as described above, I still do not believe we have a complete understanding of many of the governmental actions taken in regards to Japanese Americans. The documents that have come to light in recent years present a dramatically different picture from that known by earlier researchers. The new evidence of affirmative governmental concealment and misrepresentation of evidence by the Departments of War and Justice permit a new light to be shed on earlier hypotheses in regards to the wartime actions.

/s/ Aiko Herzig-Yoshinaga  
AIKO HERZIG-YOSHINAGA

Sworn to and subscribed before me this 17th day of January, 1984.

/s/ Barbara Ann Field  
Notary Public

My commission expires August 14, 1987.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-750

WILLIAM HOHRI, *et al.*, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT OF WILLIAM HOHRI

STATE OF ILLINOIS     )  
                                  ) ss:  
COUNTY OF COOK     )

WILLIAM HOHRI, being duly sworn, deposes and states the following:

1. My name is William Hohri. I am the national chairperson of the National Council for Japanese American Redress ("NCJAR"). I am also a named plaintiff in this suit. Although I was an American citizen, I was imprisoned in Manzanar detention camp during World War II due to my Japanese ancestry.

2. This "Affidavit" is based on my personal experiences, my personal knowledge, my work as a Japanese American leader, my archival research, and my work as a researcher and writer on the wartime incarceration of Japanese Americans. As a national chairperson of NCJAR, I have attended numerous conferences, hearings and seminars at which Japanese Americans have testified or spoken of their personal experiences in the camps, their subsequent experiences following release from the



camps, and their thoughts about redress. I have also spoken at many meetings, including testimony before the Commission on Wartime Relocation and Internment of Civilians, and the Conference on Redress at the University of Utah.

3. In recent years, I have personally reviewed over 30,000 archival documents and secondary materials regarding United States wartime actions against Japanese Americans. At the present time, I am engaged full time in writing on these topics. Based on my personal experiences in the camps and subsequent involvement in redress efforts, I am familiar with many of the reasons why I and other members of the plaintiff class did not file suit against the United States for damages and other relief due to the wartime actions of the United States against us.

4. One of the reasons for our not filing this suit earlier was our fear that the Supreme Court decisions in *Korematsu*, *Hirabayashi*, and *Yasui* were written in stone, immutably validating the United States wartime actions and depriving us of any legal remedies for the massive injuries inflicted on us. These rulings devastated our faith in the American legal system and made a folly of our supposed Constitutional rights as citizens, for we learned that Japanese Americans had no rights. Only in the past year or two, with the discovery of heretofore undisclosed government documents, has evidence been available that the United States knew what it was doing to us, knew there was no basis for imprisoning us, and intentionally continued to cover up this information. For example, this new evidence shows that as early as May 1943, high war department officials acknowledged there was no military necessity for our continued detention, and further that Department of Justice attorneys had tried to warn the Supreme Court of the government's knowing lack of factual basis for its claims of military necessity.

5. Our disillusionment with the American legal system and our earlier losses in the Courts were compounded

by the Japanese American Claims Act, whose exclusions and administrative bungling provided no semblance of redress, or indeed even of replacement of basic physical possessions. We were intentionally led to believe that the Act was all that the United States would or could do for us. Although we did not realize it at the time, the Act did not even attempt to provide a fair trial or hearing to review what had happened to us, and was oblivious to the personal and constitutional injuries we suffered. Acceptance of any award under the Act coerced explicit waiver of our right to any further claims against the government. Who then could know that we had further claims, or that they could be asserted in court?

6. We also did not sue for redress at an earlier time because of the daily struggle for survival following our release from the camps. Basic education in civics and other subjects relevant to our possible claims was denied to us in the camps. Exclusion and imprisonment, and the attendant indignities to which we were subjected, deprived us of every means of support upon our attempted reentry into society. Our life in the camps and thereafter demonstrated that we had no rights or claims. The government accepted no responsibility for the hardship it had caused us, and provided us only a one-way bus ticket to the destination of our choice, and, if one was lucky, twenty five dollars. Many of us were not permitted to return to our homes upon release, or found that our homes and property had been destroyed. Jobs, loans, housing, and even normal human social contact were often denied to us due to American society's continuing suspicions of our loyalty, racial stigma, and the circumstances of our forced departure, which the United States government has done everything to create and perpetuate. Pervasive racial antagonism combined with our loss of virtually everything we had as individuals and as a community, caused a day-to-day personal struggle to survive, and to feed, house, and clothe ourselves and our families. We did not have the luxuries of thinking about

retaining counsel, conducting archival research, or challenging the government that had done this to us.

7. We also did not sue promptly because we continued to be afraid. Even after the camps were closed, we had a constant fear that we were still being watched, that the government would use information it had obtained about us from informants and "analysts" in the camps to our detriment, and that the government could again retaliate against us or put us behind barbed wire upon the slightest excuse or suspicion of disloyalty. We feared that any challenge to the government's actions would be construed as un-American and would subject us to further punishment and suspicions of disloyalty. We knew how easily Japanese-Americans lost their citizenship by so-called "renunciations" at Tule Lake and other detention camps. We were victims, and our victimization caused us to run, to hide, to try to forget what had happened, and above all not to rock the boat by bringing attention to ourselves, our race, or our injuries.

8. We could not even bring suit because to do so required us to assert our Japanese American identity. The government's wartime actions inculcated us with racial self-loathing. We desired to disassociate ourselves from all things "Japanese", including avoidance of contact with other Japanese-Americans, ethnic Japanese culture, language, music, or other evidence of our ethnic heritage. Furthermore, we were warned by government officials upon our release from the camps not to live near or associate with other Japanese-Americans, not to talk about the camps or the wartime actions, and not to dwell on matters relating to our race. These warnings greatly inhibited the activities necessary to pursue redress.

9. We were also fearful of challenging the government's actions through suit because of our knowledge of the retaliatory and sometimes brutal actions the government had taken against others who had challenged those actions. Peaceful group demonstrations in the camps were met by the government with machine gun fire, tear

gas, infliction of arbitrary deaths and injuries, and arrests, beatings, and other punishments of suspected leaders. Individual protests often met similar retaliation, including being labeled as "disloyal," threatened with segregation, deportation, or loss of U.S. citizenship; solitary confinement or stockade "cages" for long periods of time; denial of any communication of knowledge of family and friends; threats of death or other bodily injuries; and inhumane deprivations of food, sleep, clothing, and shelter.

10. Given our knowledge of the government's ability and willingness to inflict such punishment on us as citizens in response to what we now know was supposed to be our legal right to petition for redress, *and* the approval and ratification of the wartime actions against us by the Executive, Legislative, and Judicial Branches, until recently we were realistically unable to challenge the wartime actions by a suit such as the present one. We did not even have what the civil rights workers in the 1960's and 1970's had; a government and a court system which would tell us that we had in fact been wronged.

/s/ William Hohri  
WILLIAM HOHRI

Sworn to and subscribed before me this 17th day of January, 1984.

/s/ Marilyn S. Silner  
Notary Public

My commission expires [illegible].



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

---

No. CR-27635-MHP

FRED TOYOSABURO KOREMATSU, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

---

GOVERNMENT'S RESPONSE AND  
MOTION UNDER L.R. 220.6

In 1942, petitioner was one of a very few standard bearers who chose to challenge the propriety of World War II military orders which resulted in the mass evacuation of over one-hundred thousand persons of Japanese ancestry from the west coast.

Although the judiciary questioned the wisdom of those military orders, *Korematsu v. United States*, 323 U.S. 214, 225 (Frankfurter J. concurring), it affirmed petitioner's misdemeanor conviction because it upheld the very broad discretionary authority of the Legislative and Executive Branches of government acting together in wartime. *Korematsu v. United States*, 323 U.S. 214, 217-218 (1944).

Both of those branches of government have long since concluded that the mass evacuation was part of an unfortunate episode in our nation's history. In the 1976 presidential proclamation formally rescinding Executive Order 9066, President Ford praised the sacrifices and contributions of Japanese-Americans and called upon the American people to affirm with him the lesson "learned from the tragedy of that long-ago experience forever to treas-

ure liberty and justice for each individual American, and resolve that this kind of action shall never again be repeated." Proclamation No. 4417. 41 Fed. Reg. No. 35 p. 7741 (Feb. 20, 1976).

The Legislative Branch has acted likewise. Even before the creation in 1980 of the Commission on Wartime Relocation and Internment of Civilians, Congress enacted 18 U.S.C. 4001(a) in 1971 which provides that "no citizen shall be . . . detained by the United States except pursuant to an Act of Congress." The only Act of Congress which had allowed such action, Public Law 77-503, then codified at 18 U.S.C. 1383 (which petitioner was convicted of violating in 1942) has been explicitly repealed. P.L. 94-412, Title V, § 501(e), 90 Stat. 1258 (1976).

In this specific context, the government has concluded—without any intention to disparage those persons who made the decisions in question—that it would not be appropriate to defend this forty year old misdemeanor conviction. Because we believe that it is time to put behind us the controversy which led to the mass evacuation in 1942 and instead to reaffirm the inherent right of each person to be treated as an individual, it is singularly appropriate to vacate this conviction for non-violent civil disobedience. It is also the intention of the government to extend the same relief to other similarly situated individuals who request it.

There is, therefore, no continuing reason in this setting for this court to convene hearings or make findings about petitioner's allegations of governmental wrongdoing in the 1940's. Moreover, as the Commission found after spending three years and more than \$1 million dollars, no completely satisfactory answer can be reached about these emotion laden issues from this vantage point in history. See, Addendum and Additional Views to Commission's Report.

Having recited above the current valid national interests to be served by vacating this misdemeanor conviction and dismissing the indictment at this time, the govern-

ment hereby moves to vacate petitioner's conviction and dismiss the underlying indictment. See *Rinaldi v. United States*, 434 U.S. 22 (1978), and *United States v. Hamm*, 659 F.2d 624, 631 (5th Cir. 1981) (en banc).

Thereupon, petitioner having received all the relief which this Court can render, the petition should be dismissed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

\_\_\_\_\_  
No. CR-27635W-MHP

FRED TOYOSABURO KOREMATSU, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

\_\_\_\_\_  
**ORDER**

The government's motion to vacate the conviction and dismiss the indictment and coram nobis petition is hereby granted.

\_\_\_\_\_  
Date

HON. MARILYN HALL PATEL  
U.S. District Judge



SUPREME COURT OF THE UNITED STATES

---

No. 86-510

UNITED STATES, PETITIONER

*v.*

WILLIAM HOHRI, ET AL.

---

ORDER ALLOWING CERTIORARI

Filed November 17, 1986

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Justice Scalia took no part in the consideration or decision of this petition.

# **PETITIONER'S BRIEF**



No. 86-510

5

Supreme Court, U.S.  
FILED

JAN 16 1987

JOSEPH F. SPANIOL, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HOHRI, ET AL.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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69 pp

### QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction under 28 U.S.C. 1295(a)(2) over the appeal in a case brought under both the Tucker Act and Federal Tort Claims Act (FTCA); and, if not, whether the Federal Circuit nonetheless has exclusive jurisdiction when the FTCA claim is frivolous because plaintiffs never filed an administrative claim as required by 28 U.S.C. 2675(a).

2. Whether Takings Clause claims brought by Japanese-Americans and resident Japanese aliens for losses incurred during World War II are barred by the six-year statute of limitations (28 U.S.C. 2401).



## PARTIES TO THE PROCEEDING

Respondents are William Hohri; Hannah Takagi Holmes; Chizuko Omori, individually and as representative for Haruko Omori; Midori Kimura; Merry Omori; John Omori, individually and as representative for Juro Omori; Gladys Sumida; Kyoshiro Tokunaga; Tom Nakao; Harry Ueno; Edward Tokeshi; Kinnosuke Hashimoto; Nelson Kitsuse, individually and as representative for Takeshi Kitsuse; Eddie Sato; Sam Ozaki, individually and as representative for Kyujiro Ozaki; Kumao Toda, individually and as representative for Suketaro Toda; Kaz Oshiki; George R. Ikeda; Theresa Takayoshi, individually and as representative for Tomeu Takayoshi; and the National Council for Japanese American Redress.

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-510

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HOHRI, ET AL.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

## OPINIONS BELOW

The majority and dissenting opinions of the court of appeals panel (J.A. 13-81) are reported at 782 F.2d 227. The order of the court of appeals denying rehearing en banc and the accompanying opinions (J.A. 83-107) are reported at 793 F.2d 304. The opinion of the district court (J.A. 109-156) is reported at 586 F. Supp. 769.

## JURISDICTION

The judgment of the court of appeals was entered on January 21, 1986. A petition for rehearing with suggestion for rehearing en banc was denied on May 30, 1986 (J.A. 82-84). On August 13, 1986, Justice White extended the time within which to file a petition for a writ of certiorari to and including September 27, 1986. The petition for a writ of certiorari was filed on September 26, 1986, and was granted on

November 17, 1986. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATUTES AND PRESIDENTIAL PROCLAMATION INVOLVED

The texts of relevant statutes and of Presidential Proclamation No. 4417, 41 Fed. Reg. 7741 (1976), are set out in App., *infra*, 1a-6a.

### STATEMENT

#### A. Historical Background

1. Following the bombing of Pearl Harbor, the United States Government took a number of actions relating to military security and protection against espionage and sabotage.<sup>1</sup> Among the steps taken were the issuance of two executive orders by President Roosevelt. On February 19, 1942, he issued Executive Order No. 9066, 7 Fed. Reg. 1407 (J.A. 259-260), which declared that "[t]he successful prosecution of the war requires every possible protection against espionage and against sabotage" and authorized "the Secretary of War, and the Military Com-

<sup>1</sup> On December 7, 1941, President Franklin D. Roosevelt, acting pursuant to the Alien Enemy Act of 1798, 50 U.S.C. 21, proclaimed that "an invasion has been perpetrated upon the territory of the United States by the Empire of Japan" and directed that alien Japanese residing within the United States or its territories were "to comply strictly with the regulations which are hereby or which may be from time to time promulgated by the President" (Proclamation No. 2525, 6 Fed. Reg. 6321, 6321). He specifically authorized the Attorney General to exclude alien enemies from designated areas, including "any locality in which residence by an alien enemy shall be found to constitute a danger to the public peace and safety of the United States" (*id.* at 6323). During the next two months, Attorney General Francis B. Biddle ordered enemy aliens excluded from some 84 areas on the West Coast (see J.A. 113).

manders whom he may from time to time designate," to define military areas from which "any or all persons may be excluded." Executive Order No. 9066 further authorized the Secretary of War to enforce exclusion orders through the use of federal troops and agencies, and directed executive departments and federal agencies to assist the Secretary by furnishing food, clothing, shelter, medical aid, and other needed supplies and equipment.<sup>2</sup>

On March 18, 1942, President Roosevelt issued Executive Order No. 9102, 7 Fed. Reg. 2165, which created the War Relocation Authority in order to "effectuate a program for the removal, from the areas designated from time to time by the Secretary of War or appropriate military commander under the au-

<sup>2</sup> On February 20, 1942, Secretary of War Henry L. Stimson delegated authority under Executive Order No. 9066 to Lt. General John L. DeWitt, the Commanding General of the Western Defense Command, to designate military areas in the Western United States. See *Hirabayashi v. United States*, 320 U.S. 81, 86 (1943). On March 2, in Public Proclamation No. 1, 7 Fed. Reg. 2320, General DeWitt designated as military areas the western portions of California, Oregon, and Washington, and the southern portion of Arizona, stating that the Western Defense Command was "particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war and \* \* \* is subject to espionage and acts of sabotage." On March 24, General DeWitt issued Public Proclamation No. 3, 7 Fed. Reg. 2543, which established a curfew for all alien Japanese, Germans, and Italians and for all persons of Japanese ancestry within military areas. The principal public proclamations, together with the Executive Orders and Civilian Exclusion Order Nos. 1 and 57, were reprinted as part of the Brief for the United States at 90-124 in *Hirabayashi v. United States*, *supra*. The Court also quoted many of those materials and the pertinent statutes in its opinion (320 U.S. at 85-89).



thority of Executive Order No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision." Three days later, on March 21, Congress made it a crime to "enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War." Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (codified at 18 U.S.C. (Supp. II 1942)) 97a, recodified at 18 U.S.C. (1952 ed.) 1383, repealed, Act of Sept. 14, 1976, Pub. L. No. 94-412, § 501(e), 90 Stat. 1258 (1976)).<sup>3</sup> Congress found that the need for such legislation "arose from the fact that the safe conduct of the war requires the fullest possible protection against either espionage or sabotage to national defense material, national defense premises, and national defense utilities" (H.R. Rep. 1906, 77th Cong., 2d Sess. 2 (1942)).

Beginning on March 24, 1942, and over the next four months, Lt. General John L. DeWitt, Commanding General of the Western Defense Command, issued a series of 108 Civilian Exclusion Orders, directing the evacuation from the West Coast and resettlement of persons of Japanese ancestry, whether aliens or citizens. See *Ex parte Endo*, 323 U.S. 283, 288 (1944). By August 1942, some 92,000 persons had been evacuated to assembly centers, from which they were eventually moved to relocation camps. Ulti-

<sup>3</sup> The provisions of the Act of March 21, 1942, were repealed in 1976 because of Congress's "conviction that such powers are inappropriate in peacetime" (S. Rep. 94-1168, 94th Cong., 2d Sess. 7 (1976); see H.R. Rep. 94-238, 94th Cong., 1st Sess. 9-10 (1975)).

mately, some 120,000 persons were relocated. See J.A. 114-115; 50 U.S.C. App. 1981 note § 2(a)(1).<sup>4</sup> In December 1944 the War Department rescinded the general exclusion order; in September 1945 all individual exclusion orders were revoked. The last relocation camp was closed by March 1946. See J.A. 118.

2. Recognizing that "[t]he evacuation orders gave the persons affected desperately little time in which to settle their affairs," that the "safeguards that were designed to prevent undue loss \* \* \* were never entirely successful," and that "the losses have been heavy" (Letter from J.A. Krug, Secretary of the Interior, to Joseph W. Martin, Jr., Speaker of the House (Mar. 17, 1947), *reprinted in* H.R. Rep. 496, 82d Cong., 1st Sess. 1, 2 (1951)), Congress enacted the Japanese-American Evacuation Claims Act of 1948, ch. 814, 62 Stat. 1231 (codified as amended at

<sup>4</sup> In *Hirabayashi v. United States*, *supra*, and *Yasui v. United States*, 320 U.S. 115 (1943), this Court unanimously upheld convictions under the Act of March 21, 1942, for violations of curfew orders. In *Korematsu v. United States*, 323 U.S. 214 (1944), a divided Court upheld a conviction for violation of an exclusion order. In a case decided the same day as *Korematsu*, *Ex parte Endo*, 323 U.S. 283 (1944), the Court avoided a constitutional challenge to the relocation orders and the detention aspects of the program, deciding instead that the War Relocation Authority lacked authority under either the Act of March 21, 1942, or Executive Orders Nos. 9066 and 9102 to detain concededly loyal, law-abiding U.S. citizens such as Ms. Endo. See 323 U.S. at 297; *id.* at 308 (Roberts, J., concurring). The Court pointed out in *Korematsu* that evacuation orders, whose constitutionality it upheld in *Korematsu*, and detention orders, whose constitutionality it did not reach in *Endo*, "pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others." 323 U.S. at 221; see also *id.* at 222.

50 U.S.C. (& Supp. II) App. 1981-1987). More than 26,000 claims for aggregate payment of \$148,000,000 were filed under the Act, and approximately \$37,000,000 was paid. See Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 118 (1982) [hereinafter *Personal Justice Denied*].

In 1976 President Gerald R. Ford formally proclaimed that all authority conferred by Executive Order No. 9066 had terminated on December 31, 1946, when the end of World War II was proclaimed. In his proclamation President Ford stated that the evacuation had been one of "our national mistakes"; that the issuance of Executive Order No. 9066 was "a sad day in American history"; that the evacuation and detention were a "setback to fundamental American principles"; that "we should have known then [that] not only was the evacuation wrong, but Japanese-Americans were and are loyal Americans"; that this "long-ago experience" was a "tragedy"; and that "this kind of action [should] never again be repeated." Proclamation No. 4417, 41 Fed. Reg. 7741 (1976).

In 1980 Congress established the Commission on Wartime Relocation and Internment of Civilians (see 50 U.S.C. App. 1981 note). Congress found that "no sufficient inquiry has been made" into the detention and relocation of approximately 120,000 civilians pursuant to Executive Order No. 9066 and the relocation of approximately 1000 civilians from the Aleut and Pribilof Islands (50 U.S.C. App. 1981 note § 2(a)). Accordingly, the Commission was established "to gather facts to determine whether any wrong was committed" and "provide a basis for appropriate recommendations" (S. Rep. 96-751, 96th Cong., 2d Sess. 1, 3 (1980)). The primary duty of the Com-

mission was to "review the facts and circumstances surrounding Executive Order Numbered 9066" and to submit a written report to Congress (50 U.S.C. App. 1981 note § 4). The Commission's report, *Personal Justice Denied*, is dated December 1982 and was publicly released in February 1983.<sup>6</sup>

#### B. Proceedings Below

1. On March 16, 1983, respondents, an organization of Japanese-Americans and 19 citizens or resident aliens of Japanese ancestry who were involved in the relocation program under Executive Order No. 9066, filed suit in district court against the United States. They requested certification of a class consisting of approximately 120,000 Japanese-Americans and resident Japanese aliens, or their descendants,<sup>6</sup> and alleged 22 causes of action arising out of their evacuation and internment. J.A. 157-215. Among the causes of actions alleged were claims under the Takings Clause of the Fifth Amendment (Count III,

<sup>6</sup> On June 16, 1983, the Commission fulfilled its mandate under 50 U.S.C. App. 1981 note § 4(a) (3) by issuing a five-point recommendation, including a recommendation for a lump-sum payment of \$20,000 to each surviving evacuee. Congress has since had before it several bills that would make lump-sum payments. *E.g.*, H.R. 3387, 98th Cong., 1st Sess. (1983); H.R. 4100, 98th Cong., 1st Sess. (1983); S. 1520, 98th Cong., 1st Sess. (1983); see *Japanese-American and Aleutian Wartime Relocation: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984); *Japanese American Evacuation Redress: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983).

<sup>6</sup> The district court postponed ruling on the certification of the class until resolution of the government's motion to dismiss (J.A. 110 n.1).



J.A. 207-208), tort claims (Counts XVII-XX, J.A. 212-213), and allegations of breach of contract and fiduciary duty (Counts XXI-XXII, J.A. 213-214).<sup>7</sup> Respondents requested an award of damages for each cause of action for each class member (J.A. 215). Jurisdiction was alleged under 28 U.S.C. 1331, 1346 (a) (2), and 1346(b) and other provisions (J.A. 162).<sup>8</sup>

On motion by the government to dismiss for lack of subject-matter jurisdiction (Fed. R. Civ. P. 12(b) (1)), the district court dismissed the suit in its entirety. The court held that sovereign immunity barred all of the claims except for those that could be pursued under either the Tucker Act, 28 U.S.C. 1346(a) (2), 1491, or the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* J.A. 128-131, 153-154. The court held that respondents' tort claims were barred by the FTCA's two-year statute of limitations (28 U.S.C. 2401(b)) and by respondents' failure to exhaust their administrative remedies as required by 28 U.S.C. 2675(a) (J.A. 151-153). The court dismissed the breach-of-contract claim on the basis of the statute of limitations (J.A. 147-

<sup>7</sup> The complaint also asserted a number of other constitutional claims (Counts I-II, IV-XV) and a claim for conspiracy to deprive plaintiffs of their civil rights (Count XVI), all of which were held by the district court to state no cause of action for damages against the United States (J.A. 129-130, 153).

<sup>8</sup> Because respondents limited their prayer for damages to \$10,000 for each nontort cause of action for each class member (J.A. 162, 215), respondents' Tucker Act claims fell under 28 U.S.C. 1346(a) (2), the "Little Tucker Act," which provides for concurrent jurisdiction in the United States Claims Court and in the district courts. Only the Claims Court can hear Tucker Act claims for more than \$10,000. 28 U.S.C. 1491.

149), and the breach-of-fiduciary-duty claim on the ground that no fiduciary duty existed (J.A. 149-150).

The district court held that respondents' taking claims stated a cause of action against the United States under the Tucker Act but were barred by the six-year statute of limitations (28 U.S.C. 2401(a)). J.A. 136-147. Respondents argued before the district court that the statute of limitations was tolled because the government had fraudulently concealed information that was essential to their Takings Clause claims. Respondents did not allege that they had not known of their property losses, but rather that the government had concealed memoranda suggesting the absence of military necessity for the evacuation of Japanese-Americans on the West Coast, and that any suit brought under the Takings Clause after the war would have "foundered upon the government's defense that evacuation and internment were required by military necessity" (J.A. 137-139). Respondents argued that the concealed evidence was first revealed in *Personal Justice Denied*, and that, accordingly, the statute of limitations did not begin to run until that report was released in 1983.

Specifically, respondents alleged that documents written during the war called into question the military necessity for the evacuation. The first of these was a memorandum (J.A. 226-237) prepared in January 1942 by Lt. Commander Kenneth Ringle, of the Los Angeles Branch of the Office of Naval Intelligence, in which he offered his opinion that the "Japanese Problem" had been magnified out of proportion, that 75% of Japanese-Americans were loyal and a majority of resident Japanese aliens "at least passively loyal to the United States," and that the "potentially dangerous element" could be individually

identified. J.A. 227-229. Respondents also referred to two memoranda written in 1944 by FCC Chairman James Fly and FBI Director J. Edgar Hoover (see J.A. 238-243 (Fly); C.A. App. 273, 275 n.53 (summarizing Hoover)), which questioned certain findings concerning shore-to-ship communications stated in General DeWitt's *Final Report*.<sup>9</sup>

The district court found that "the events surrounding the evacuation and internment have been subjected to intense scrutiny over the years and have produced a lengthy literature" and that the Ringle, Fly, and Hoover memoranda had been published "at least as early as 1949" in Martin Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation* (1949). J.A. 141-142 & n.26.<sup>10</sup> The district court

<sup>9</sup> U.S. Army, Western Defense Command, *Final Report: Japanese Evacuation from the West Coast 1942* (1943). The *Final Report* was published in book form by the Government Printing Office and was made public in January 1944.

<sup>10</sup> Respondents also pointed to documents that they claimed were disclosed for the first time in the Commission report dated 1982. The district court discussed those documents and found that they were either irrelevant to respondents' claims or corroborative of information already available (J.A. 142-146). Three of the documents were wartime Justice Department memoranda in which Edward Ennis, Director of the Department's Alien Enemy Control Unit, and attorney John Burling urged that the evidence questioning military necessity—notably, the substance of the Ringle report, which in fact had been published in the October 1942 issue of *Harper's*—should be called to this Court's attention in the government's briefs in *Korematsu* and *Hirabayashi* (J.A. 264-269, 272-276 (Ennis), 270-271 (Burling)). The district court noted that the documents to which Ennis and Burling referred "became public and were available to diligent plaintiffs from the late 1940's onward," that "there has long been sufficient circumstantial evidence" that the Justice Department had the Ringle, Fly, and Hoover memoranda when it filed its brief in *Korematsu* (J.A. 146), and that the "concealment, whether

concluded that, because "[t]hese publications lay out almost all of the facts alleged by [respondents], along with many others," respondents could not "claim that the facts underlying their suit were discovered by the Commission on Wartime Relocation and Internment of Civilians. \* \* \* [A] suit could have been filed long ago." J.A. 141-142.

2. Respondents appealed to the United States Court of Appeals for the District of Columbia Circuit. A divided panel of that court held that it had jurisdiction to hear the appeal and reversed the dismissal of the Takings Clause claims. With respect to the jurisdictional question, the majority held that, since respondents had alleged claims under both the Tucker Act and the FTCA, the "except" clause in 28 U.S.C. 1295(a)(2) deprived the Federal Circuit of jurisdiction (J.A. 32-35). Although the majority recognized that the Federal Circuit's jurisdiction remains exclusive when the FTCA claims in a complaint are frivolous (J.A. 33 n.27), and although the court upheld dismissal of those claims (J.A. 44-45 & n.48), the majority held that the FTCA claims were not frivolous (J.A. 33 n.27).<sup>11</sup> Chief Judge Markey of the Federal Circuit, sitting by designation, dissented on the ground that mixed Tucker Act/FTCA cases must be appealed to the Federal Circuit (J.A. 68-74). He also argued that the FTCA claims were "entirely illusory" and frivolous (J.A. 70, 74).

On the merits, the court of appeals reversed the district court's dismissal of respondents' Takings

intentional or not, [was] not a basis for tolling a statute of limitations beyond the time the information concealed by that conduct was published" (J.A. 145).

<sup>11</sup> The court nevertheless acknowledged that, because the FTCA claims had been dismissed, all future appeals in this case would be heard by the Federal Circuit (J.A. 35 n.31).



Clause claims, holding that the statute of limitations had been tolled until 1980. The majority began with the premise that in *Korematsu v. United States*, *supra*, and *Hirabayashi v. United States*, *supra*, at least partly as a result of government concealment, this Court had established a "virtually insurmountable presumption of deference to the judgment of the military authorities" that evacuation of all Japanese-Americans was justified by military necessity (J.A. 18, 22-23, 27). The court of appeals inferred that, because of this standard of deference, any claim for just compensation brought after the war would have been barred on the ground that the taking was justified by military necessity and would not have "survive[d] a threshold motion to dismiss" (J.A. 53 n.57).

The majority agreed with the district court that the evidence concealed during the war had been in the public domain since 1949 and confirmed that evidence published in the 1940s "should have alerted [respondents] to the need to conduct further inquiries into the factual basis of their claims" (J.A. 55 & n.60; see also J.A. 59). But the majority rejected, as resting on a "legally defective premise," the district court's conclusion that the statute of limitations began to run at that time (J.A. 55). Instead, the majority held that "[g]iven the constitutional underpinnings of the presumption of deference articulated by the Court \* \* \* nothing less than an authoritative statement by one of the political branches, purporting to review the evidence when taken as a whole, could rebut the presumption articulated in *Korematsu*" (J.A. 56; see also J.A. 59). The majority found such an "authoritative statement" in the 1980 Act creating the Commission on Wartime Relocation and Internment of Civilians, by which "Congress finally removed the presumption of deference to

the judgment of the political branches," and "the statute of limitations began to run" (J.A. 60). Respondents' Takings Clause claims, filed in 1983, were therefore timely.

Chief Judge Markey again dissented, noting that, "[w]hatever may be made of the argument that suit would be fruitless in view of *Hirabayashi* and *Korematsu*, that argument collapsed entirely about 1950," and pointing out that the district court's finding that respondents had sufficient evidence to file a complaint 35 years ago "has not truly been contested" (J.A. 77). Chief Judge Markey found "no plausible support in the record" for the "bald assertion that 'only a statement by one of the political branches could have rebutted the presumption of deference' due the military authorities" (J.A. 78).

A sharply divided court denied rehearing en banc. The five dissenters expressed "complete agreement" with Chief Judge Markey's opinion on both jurisdictional and statute of limitations grounds (J.A. 85). They added that the majority's insistence on an authoritative statement from a political branch before Takings Clause claims could be brought was based on a misinterpretation of *Hirabayashi* and *Korematsu*, since "[n]either case holds, or even remotely suggests, that military necessity also required that the internees' property be taken" (J.A. 91). Moreover, even if a statement by a political branch was required, the dissenters argued that it was made by President Ford in 1976, a date that was "inconveniently early[]" for the panel majority's purposes" (J.A. 89 n.1). Finally, assuming that they were incorrect on every other point, the dissenters argued that "the statement by one of the 'war-making branches' the panel majority requires could have been extracted through litigation," so that "this suit could have been brought successfully at any time within the

past forty years" (J.A. 93). In a separate statement, the panel majority defended its opinion (J.A. 103-107).

### SUMMARY OF ARGUMENT

I. The Federal Circuit, not the D.C. Circuit, had jurisdiction over this appeal. The Federal Courts Improvement Act was intended to centralize all nontax Tucker Act appeals in the Federal Circuit, even when the jurisdiction of the district court was based only "in part" on the Tucker Act. The "except clause" of 28 U.S.C. 1295(a)(2) does not state an exception to that policy, but rather lists claims that are not an independent basis for Federal Circuit jurisdiction. When mixed with Tucker Act claims that provide a basis for Federal Circuit jurisdiction, "except clause" claims do not act as a bar to that jurisdiction.

Moreover, even if the court below was right in holding that appeals in mixed Tucker Act/FTCA appeals must be heard by the regional court of appeals rather than the Federal Circuit, this was not such a case. Frivolous claims in complaints are to be disregarded in applying Section 1295(a)(2), and the FTCA claims in the complaint here were frivolous because respondents ignored the hornbook principle, followed by every federal court of appeals, that the filing of an administrative claim is a nonwaivable, jurisdictional prerequisite to pursuing an FTCA action.

II. The statute of limitations on respondents' Takings Clause claims was never tolled at all and, even if tolled, expired more than six years before this action was brought. This Court's decisions in *Hirabayashi* and *Korematsu*, which supposedly created a virtually insurmountable rule of deference to military decisions in connection with the relocation program, were not the result of government concealment. Further, even if those cases had been wrongly

decided as a result of government concealment, they would not have prevented a claim under the Takings Clause. Those decisions were carefully limited, only upholding a curfew and upholding the evacuation (not "internment"). Moreover, the government at the time recognized that the evacuation did not require the taking of property.

Assuming that the statute of limitations was nonetheless tolled, any tolling ended around 1950, with the disclosure of the arguably relevant materials that had not been disclosed during the war. By insisting that only a governmental admission of wrongdoing would start the running of the statute, the court of appeals has all but done away with the statute of limitations as a distinct defense. If, somehow, it was correct in that action and an authoritative statement by a political branch was required, it came in 1976, when President Ford proclaimed that the evacuation had been wrong. Thus, the complaint, filed more than six years after that event, was time barred even if the court of appeals was correct in all but the last point of its reasoning.

### ARGUMENT

#### I. EXCLUSIVE JURISDICTION OVER THE APPEAL IN THIS CASE LAY IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The complaint in this case asserted district court jurisdiction under both the Little Tucker Act, 28 U.S.C. 1346(a)(2), and the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b). The court of appeals recognized that cases raising only nontax Tucker Act claims can be heard on appeal only in the Federal Circuit. Construing the language of 28 U.S.C. 1295(a)(2), however, it held further that a mixed Tucker Act/FTCA case, in which the FTCA



claim is not frivolous, must be appealed to the regional court of appeals. Holding that the FTCA claim in this case was not frivolous, the court found that it had jurisdiction.

Contrary to the holding of the court of appeals, all cases in which the jurisdiction of the district court "was based, in whole or in part" (28 U.S.C. 1295(a)(2)), on a nontax Tucker Act claim are within the exclusive jurisdiction of the Federal Circuit, no matter what other claims have been joined with the Tucker Act claim in the complaint, and whether or not those other claims are frivolous. Even if we are wrong on that point, the FTCA claims in this case are frivolous.

#### A. The Federal Circuit Has Exclusive Jurisdiction Over All Nontax Tucker Act Appeals

1. We start, as did all of the opinions below (J.A. 32, 72, 96-97), with the proposition that Congress, through the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, created the Federal Circuit in order to provide a single forum for the uniform adjudication of issues thought by Congress to require centralized treatment at a level below the Supreme Court. See S. Rep. 97-275, 97th Cong., 1st Sess. 2-4 (1981). Among the matters thought to require such uniform treatment were nontax claims arising under the Tucker Act, 28 U.S.C. 1346(a)(2), 1491. Trial court jurisdiction over Tucker Act claims was assigned by Section 1491 to the new United States Claims Court, from which all appeals must be taken to the Federal Circuit under 28 U.S.C. 1295(a)(3). Concurrent jurisdiction over Tucker Act claims for \$10,000 or less was left in the federal district courts by Section 1346(a)(2), but Congress's desire to centralize Tucker Act appeals in

the Federal Circuit was realized by placing in that Court exclusive jurisdiction over appeals of the district courts' Section 1346(a)(2) decisions. Specifically, Congress provided (28 U.S.C. 1295(a)(2)) that the Federal Circuit has exclusive jurisdiction

of an appeal from a final decision of a district court of the United States \* \* \* if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title.

There is no dispute that this statute was intended to centralize Tucker Act appeals in the Federal Circuit, or that—by virtue of the statutory phrase "in whole or in part"—the Federal Circuit will sometimes have exclusive jurisdiction over appeals including non-Tucker Act issues that would have been decided by the regional courts of appeals had they not appeared in the same case as a Tucker Act claim.<sup>12</sup>

<sup>12</sup> While the legislative history nowhere discusses mixed Tucker Act/non-Tucker Act cases, it does discuss mixed patent/nonpatent cases dealt with in Section 1295(a)(1). That section gives the Federal Circuit exclusive jurisdiction over an appeal if the jurisdiction of the district court "was based, in whole or in part," on the relevant statutory provision (Section 1338, relating to patents and plant variety protection), with certain exceptions. Because there is no exception for cases raising antitrust issues (which often are joined with patent issues), Section 1295(a)(1) appears to give the Federal Circuit exclusive jurisdiction over antitrust issues as well as patent issues appearing in the same case.

The Department of Justice, which drafted Section 1295, intended that Section 1295(a)(1) be so construed. See *Fed-*

When adjudicating those issues, the Federal Circuit applies the law of the regional circuit of the district

*eral Courts Improvement Act of 1979: Hearings on S. 677 and S. 678 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 41 (1979) (testimony of Daniel J. Meador, Assistant Attorney General) [hereinafter 1979 Senate Hearings]; Industrial Innovation and Patent and Copyright Law Amendments: Hearings on H.R. 6033, H.R. 6934, H.R. 3806, and H.R. 2414 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. 392 (1980) (testimony of Maurice Rosenberg, Assistant Attorney General, and Frank P. Cihlar) [hereinafter cited as 1980 House Hearings].* The opponents of Federal Circuit review of antitrust issues also recognized that the "in whole or in part" language of the proposed statute required that construction. Compare *Court of Appeals for the Federal Circuit—1981: Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 90, 111 (1981) (testimony of James W. Geriak and testimony of Benjamin L. Zelenko) (as a matter of policy Federal Circuit should not be given authority to decide nonpatent claims joined with patent claims) [hereinafter 1981 House Hearings], with Federal Courts Improvement Act of 1981—S. 21 and State Justice Institute Act of 1981—S. 537: Hearings on S. 21 and S. 537 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 198 (1981) (testimony of Mr. Geriak) (recognizing that, under bill, appeal in mixed patent/antitrust case must go in its entirety to Federal Circuit) [hereinafter 1981 Senate Hearings].*

Although it has been suggested that traces of legislative history hint that true mixed cases *can* be bifurcated by the district court (see Newman, *Tails and Dogs: Patent and Antitrust Appeals in the Court of Appeals for the Federal Circuit*, 10 APLA Q.J. 237, 240-241 (1982)), the weight of authority appears to be contrary (see *Atari, Inc. v. JS & A Group, Inc.*, 747 F.2d 1422, 1434 (Fed. Cir. 1984) (district court may use this procedure only when patent claim is trivial and manipulatively joined with nonpatent claim in order to choose appel-

court from which the case came.<sup>13</sup> The Federal Circuit's status as "a court of limited jurisdiction" (see *United States v. Mottaz*, No. 85-546 (June 11, 1986), slip op. 14 n.11; H.R. Rep. 97-312, 97th Cong., 1st Sess. 39 (1981)), therefore, means only that it, like other federal courts, is limited to the jurisdiction that Congress has given to it.<sup>14</sup>

late forum); Cihlar & Goldstein, *A Dialogue About the Potential Issues in the Patent Jurisdiction of the Court of Appeals for the Federal Circuit*, 10 APLA Q.J. 284, 301 (1982) ("There is no problem with a nonpatent issue going to the CAFC in the absence of any attempt to manipulate jurisdiction at the outset. Indeed, Congress has clearly indicated that the CAFC is not to be a specialized patent court, and the CAFC will be handling many, many different kinds of nonpatent claims.")). In any event, the Federal Circuit will have exclusive jurisdiction of antitrust issues as well as patent issues in a true mixed case in which the issues have *not* been severed by the district court. Likewise, the Federal Circuit will have exclusive jurisdiction of non-Tucker Act issues as well as Tucker Act issues in a true mixed case in which the issues have not been severed by the district court.

<sup>13</sup> See, e.g., *Atari, Inc. v. JS & A Group, Inc.*, 747 F.2d at 1438-1440 (stating rule and citing several cases in support).

<sup>14</sup> Indeed, the emphasis in the House report on the limited jurisdiction of the Federal Circuit came in the context of explaining the declaration in 28 U.S.C. 1291 that "[t]he jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title." Both the House report (H.R. Rep. 97-312, *supra*, at 40), and the Senate report (S. Rep. 97-275, *supra*, at 18) note that federal courts are courts of limited jurisdiction generally. The legislative history is also replete with indications that the Federal Circuit is not to be considered a "specialized court." H.R. Rep. 97-312, *supra*, at 19; S. Rep. 97-275, *supra*, at 6; H.R. Rep. 96-1300, 96th Cong., 2d Sess. 17 (1980); S. Rep. 96-304, 96th Cong., 1st Sess. 13 (1979); 1981 Senate Hearings 270 (statement of Daniel M. Friedman, Chief Judge, U.S. Court



2. The question posed here is whether the "except" clause of Section 1295(a)(2) was intended to enumerate those claims that (alone or together with other claims) absolutely deprive the Federal Circuit of any jurisdiction, or rather simply indicates that Federal Circuit jurisdiction must be based on a portion of Section 1346 not listed in the except clause. We believe the statutory language and legislative history show that the latter interpretation is correct.

Section 1295(a)(2) confers exclusive appellate jurisdiction on the Federal Circuit when district court jurisdiction rested "in whole or in part" on 28 U.S.C. 1346, but excepts from that proviso "a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) \* \* \* or under section 1346(a)(2)" in connection with the internal revenue. As Chief Judge Markey stated in his dissent below (J.A. 69):

A literal reading of the statute makes plain that the "except clause" applies only to cases brought

of Claims) (appropriate for Federal Circuit to determine antitrust claim joined with patent claim even though predecessor courts did not decide antitrust cases); *Additional Judicial Positions: Hearing Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 116 (1981) (statement of Chief Judge Howard T. Markey, U.S. Court of Customs and Patent Appeals); *id.* at 119 (statement of Chief Judge Friedman); *1981 House Hearings* 18, 38 (statement and testimony of Chief Judge Friedman); *id.* at 45 (remarks of Congressman Sawyer); *1980 House Hearings* 378-379 (statement of Maurice Rosenberg, Assistant Attorney General); *id.* at 392 (testimony of Mr. Rosenberg and Frank P. Cihlar) (court's breadth of jurisdiction is such that it could not validly be criticized as too "narrow or specialized" to give adequate treatment to ancillary issues raised along with issues over which it had exclusive jurisdiction); *id.* at 708 (testimony of Chief Judge Friedman); see also *Atari, Inc. v. JS & A Group, Inc.*, 747 F.2d at 1436-1437.

*in whole* under one of the excepted subsections of § 1346. The majority improperly reads the "except clause" as though it *also* contained the broad jurisdictional grant of "in whole or in part," a construction clearly contrary to the literal language of the statute \* \* \*.

The legislative history supports Chief Judge Markey's reading of the statute. Although it contains no direct discussion of mixed cases involving both exclusive jurisdiction and "except" clause claims under either Section 1295(a)(1) or 1295(a)(2),<sup>15</sup> it does not leave us without clues as to what Congress meant by the "except" clause of Section 1295(a)(2).

The clearest indication of what Congress intended can be found in the paraphrase of Section 1295(a)(2) in the House report (H.R. Rep. 97-312, *supra*, at 42), which states that Section 1295(a)(2)

gives the Court of Appeals for the Federal Circuit jurisdiction of any appeal from a trial court where the jurisdiction of the district court was based, in whole or in part, on section 1346 of title 28, United States Code, except 1346(a)(1) and (e) (tax appeals), 1346(b) (Federal Tort Claims), 1346(f) (quiet title actions), or 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue.

The report thus recognizes that the "except" clause merely states an exception to otherwise exclusive Federal Circuit jurisdiction over all Section 1346 cases. While it says that the Federal Circuit does not derive jurisdiction from the presence in a case of FTCA, tax refund, and quiet title claims, it does not suggest (as the court of appeals held) that the Fed-

<sup>15</sup> Discussion of mixed cases was confined to cases mixing patent issues with antitrust issues or other issues not covered by the "except" clause of Section 1295(a)(1).

eral Circuit is denied jurisdiction over all such claims, even when they are joined with a Tucker Act (or other) cause of action that would otherwise be heard by the Federal Circuit.

Congress in fact considered placing several of the "except" clause claims within the exclusive jurisdiction of the Federal Circuit. There is no indication that in deciding not to do so Congress concluded that their presence in a case, unlike the presence of other unmentioned causes of action, would affirmatively divest the Federal Circuit of jurisdiction even in Tucker Act cases.

Eight different bills containing versions of Section 1295(a)(2) were considered by Congress before passage of the Federal Courts Improvement Act. S. 677, 96th Cong., 1st Sess. (1979); S. 678, 96th Cong., 1st Sess. (1979); H.R. 3806, 96th Cong., 1st Sess. (1979); S. 1477, 96th Cong., 1st Sess. (1979); S. 21, 97th Cong., 1st Sess. (1981); H.R. 2405, 97th Cong., 1st Sess. (1981); H.R. 4482, 97th Cong., 1st Sess. (1981); S. 1700, 97th Cong., 1st Sess. (1981). All eight made clear the exclusive jurisdiction of the Federal Circuit over Little Tucker Act appeals. All eight also made clear that, *in non-mixed cases*, the Federal Circuit would not have jurisdiction over Federal Tort Claims Act appeals or appeals in tax refund cases under 28 U.S.C. 1346(a)(1). Everything else that eventually appeared in the "except" clause, however, was at one time or another proposed to be within the exclusive jurisdiction of the Federal Circuit.

Section 1346(e), relating to certain special kinds of tax actions such as wrongful-levy actions (26 U.S.C. 7426) and actions for declaratory judgments of tax-exempt status (26 U.S.C. 7428), now appears within the "except" clause of Section 1295(a)(2).

Section 1295(b) as proposed in the original Department of Justice bill (S. 677),<sup>16</sup> however, would have given the Federal Circuit exclusive jurisdiction over all Section 1346 actions except Section 1346(a)(1) and (b) actions, so these special tax actions would have been reviewed on appeal in the Federal Circuit.

Section 1346(f), relating to Quiet Title Act actions, is also now within the "except" clause of Section 1295(a)(2). Yet every bill considered by the 96th Congress, including the two that passed their respective houses, would have given the Federal Circuit exclusive jurisdiction over Quiet Title Act appeals. S. 678 contained an affirmative grant of jurisdiction to the Federal Circuit in Quiet Title Act cases;<sup>17</sup> the other bills simply omitted the Quiet Title Act from their "except" clauses. S. 677;<sup>18</sup> H.R.

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<sup>16</sup> Section 1295(b) as proposed in S. 677, § 735(a), would have given the Federal Circuit exclusive jurisdiction over appeals from a final decision of a district court "if the jurisdiction of the district court was based, in whole or in part, on section 1346 of this title, except that: (1) jurisdiction of appeals in cases brought under section 1346(a)(1) [tax refunds] in the district courts shall be in the court of appeals for the appropriate regional circuit; and (2) jurisdiction of appeals in cases brought under section 1346(b) [Federal Tort Claims Act] shall be governed by sections 1291, 1292, and 1294 of this title."

<sup>17</sup> Section 1295(a)(2) as proposed in S. 678, § 324(c), would have given the Federal Circuit exclusive jurisdiction "in any appeal from a district court in which the jurisdiction of the district court was based, in whole or in part, on section 1346(b), except for any claim founded upon an Act of Congress or a regulation of an executive department providing for internal revenue, or on section 1346(g) of this title." Section 1346(b), as renumbered by S. 678, § 331, would have been the Little Tucker Act; Section 1346(g) would have been the Quiet Title Act.

<sup>18</sup> See note 16, *supra*.



3806;<sup>19</sup> S. 1477.<sup>20</sup> H.R. 3806 and S. 1477 passed their respective houses on September 15, 1980, and October 30, 1979, but neither was acted on in the other chamber before the 96th Congress came to a close. The first bills introduced in the 97th Congress similarly omitted Section 1346(f) from their "except" clauses. S. 21; H.R. 2405; S. 1700.<sup>21</sup> On April 2, 1981, however, Chief Judge Friedman of the Court of Claims recommended addition of the phrase "or 1346(f)" to the "except" clause of H.R. 2405, and the Department of Justice endorsed that recommendation 27 days later. *1981 House Hearings* 26, 213. H.R. 4482, § 125(a), introduced on September 15, 1981, incorporated Chief Judge Friedman's recommendation and contains the version of Section 1295 (a) (2) that is now in force.

<sup>19</sup> H.R. 3806, § 129(a), provided, in proposed Section 1295(a) (3), that the Federal Circuit would have exclusive jurisdiction over an appeal from a final decision of a district court "if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in the district court under section 1346(a) (1) [tax refunds], 1346(b) [Federal Tort Claims Act], or 1346(e) [certain tax actions] of this title shall be governed by sections 1291, 1292, and 1294 of this title."

<sup>20</sup> Except for renumbering of subsections, S. 1477, § 326(a), as originally introduced contained a jurisdictional provision identical to that contained in H.R. 3806. On August 3, 1979, the bill was reported out of committee with an amended jurisdictional section. The amendment added to the "except clause" the phrase "or under section 1346(b) [the Little Tucker Act] when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue."

<sup>21</sup> Except for renumbering of subsections, all three of these bills contained jurisdictional provisions identical to that in the amended version of S. 1477. S. 21, § 126(a); H.R. 2405, § 125(a); S. 1700, § 127(a).

Finally, the "except" clause of Section 1295(a) (2) now refers to Section 1346(a) (2) claims "founded upon an Act of Congress or a regulation of an executive department providing for internal revenue." That language was absent from S. 677, H.R. 3806 as it passed the House, and S. 1477 as introduced on July 10, 1979. (By the time it was reported out of committee on August 3, 1979, however, S. 1477 had been amended to include internal revenue Tucker Act claims in the "except" clause, and it was the amended version that passed the Senate.) See notes 16, 19 & 20, *supra*.

These changes in the various bills considered by Congress negate any inference that the "except" clause lists types of claims that Congress affirmatively intended to keep away from the Federal Circuit. As Congress gradually chipped away Section 1346 causes of action that were at first considered candidates to be within the exclusive jurisdiction of the Federal Circuit, it added them to the "except" clause along with FTCA claims and tax refund cases. This process of placing each type of claim either within the exclusive jurisdiction of the Federal Circuit or in the statute's "except" clause strongly suggests that Congress conceived of that clause as a list of claims that would not give the Federal Circuit *exclusive* jurisdiction, not as a list of claims that deprive the Federal Circuit of jurisdiction even in cases including Tucker Act claims. We therefore submit that mixed Tucker Act/FTCA cases, like mixed cases involving the Tucker Act and any other statute, must be appealed to the Federal Circuit in keeping with Congress's purpose to centralize Tucker Act appeals, and that the court below lacked jurisdiction.

**B. Even If the Federal Circuit Lacks Jurisdiction Over Appeals in Mixed Tucker Act/Federal Tort Claims Act Cases, This Is Not Such a Case**

Whatever the proper interpretation of Section 1295(a)(2), its jurisdictional consequences are not triggered simply by the citation of one or another statutory reference in a complaint.<sup>22</sup> Some basis for the claim must exist before it will be recognized in determining which court of appeals has jurisdiction. Otherwise, forum shopping would be rampant.

We believe that in determining whether a claim has a sufficient basis to be considered under Section 1295(a)(2), the court should inquire whether the claim is frivolous.<sup>23</sup> That approach finds support in

<sup>22</sup> Indeed, a case may be a Tucker Act case even though the plaintiff fails to cite the Tucker Act and protests that he did not intend to bring his lawsuit under the Tucker Act. See, e.g., *Williams v. Secretary of the Navy*, 787 F.2d 552, 557-558 (Fed. Cir. 1986); *Maier v. Orr*, 754 F.2d 973, 982 (Fed. Cir. 1985); *Heisig v. United States*, 719 F.2d 1153, 1155 (Fed. Cir. 1983); *Denton v. Schlesinger*, 605 F.2d 484, 486-487 (9th Cir. 1979); *Cook v. Arentzen*, 582 F.2d 870, 878 (4th Cir. 1978); *Mathis v. Laird*, 483 F.2d 943 (9th Cir. 1973) (per curiam); *Carter v. Seaman*, 411 F.2d 767, 771 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970).

<sup>23</sup> Another approach would be to disregard any claim that is at any time found to suffer from a "jurisdictional" defect—on the ground that the statute recognizes only those claims over which the district court actually has "jurisdiction." As explained at pages 4-6 and note 4 of our reply memorandum at the petition stage, that was the government's initial approach to the issue, and it was also the approach taken by the D.C. Circuit in *Van Drasek v. Lehman*, 762 F.2d 1065 (1985), where the court transferred a case to the Federal Circuit, which later affirmed the judgment of the district court on the basis of that court's opinion. (This Court has granted certiorari to review the Federal Circuit's judgment on issues unrelated to the question of jurisdiction (No. 86-319).) See also J.A. 70, 99 & n.4.

For example, it was once our view that a time-barred Tucker Act claim should not give rise to Federal Circuit

the legislative history. Congress was quite concerned about forum shopping; in connection with Section 1295(a)(1), it specifically indicated its concern that courts prevent forum shopping by the addition of "immaterial, inferential, and frivolous" patent claims to complaints raising other issues. See, e.g., S. Rep. 97-275, *supra*, at 19; H.R. Rep. 97-312, *supra*, at 41; see also 1981 Senate Hearings 249 (testimony of Chief Judge Markey) ("sham pleadings" will not suffice to control appellate jurisdiction); *Atari, Inc. v. JS & A Group, Inc.*, 747 F.2d at 1433-1434 & n.9. There is no reason to suppose that Congress intended a different treatment of frivolous claims under Section 1295(a)(2) than under Section 1295(a)(1).

In this case, respondents filed their action in the district court without making any attempt to present a claim to an administrative agency, as required by 28 U.S.C. 2401(b) and 2675. They asserted that the administrative-filing requirement of those Sections could be waived. Yet it is black-letter law, followed

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jurisdiction on appeal, because the statute of limitations in a case brought against the government, as a condition of the waiver of sovereign immunity, can provide a "jurisdictional" bar to suit (see, e.g., *Mottaz*, slip op. 6). That position has been rejected, however, and we think rightly so. See *Pacyna v. Marsh*, No. 84-1706 (Jan. 21, 1986) (order); *Bray v. United States*, 785 F.2d 989, 992 (Fed. Cir. 1986); *Hurick v. Lehman*, 782 F.2d 984 (Fed. Cir. 1986). Often (this case is an example), there is no doubt that a claim was brought under the Tucker Act, but whether the statute of limitations has run is a major issue (sometimes the only issue) on appeal. The jurisdiction of the court of appeals to decide the case should not turn on its decision of the major issue on appeal—whether the statute of limitations has run. A proper approach to this issue, therefore, focuses not on technical questions of jurisdiction, but more broadly on whether a claim, taken as a whole, is frivolous for any reason—jurisdictional or otherwise.



by every federal court of appeals,<sup>24</sup> that "the requirement that an administrative claim be filed before initiating suit is jurisdictional and cannot be waived." 2 L. Jayson, *Handling Federal Tort Claims* § 315, at 17-10 (1986) (footnote omitted). In the face of such a settled rule, there is no way that respondents' FTCA claims can be viewed as other than frivolous. There being no nonfrivolous FTCA claim, this was not a mixed case. Thus, even if a genuine mixed case were properly appealable to the regional circuit (which it is not), the Federal Circuit still would have had exclusive jurisdiction over this appeal.

Because the court of appeals lacked jurisdiction, this Court should vacate its judgment and remand with directions to transfer the appeal pursuant to 28 U.S.C. 1631 to the Federal Circuit. *United States v. Mottaz*, slip op. 14 n.11.

## II. RESPONDENTS' TAKINGS CLAUSE CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

If this Court reaches the merits, the judgment of the court below should be reversed and the case re-

<sup>24</sup> *Odin v. United States*, 656 F.2d 798, 802 & n.20 (D.C. Cir. 1981); *Richman v. United States*, 709 F.2d 122, 124 (1st Cir. 1983); *Keene Corp. v. United States*, 700 F.2d 836, 841 (2d Cir.), cert. denied, 464 U.S. 864 (1983); *Bialowas v. United States*, 443 F.2d 1047, 1049 (3d Cir. 1971); *Kielwein v. United States*, 540 F.2d 676, 679 (4th Cir.), cert. denied, 429 U.S. 979 (1976); *Employees Welfare Committee v. Daws*, 599 F.2d 1375, 1378 (5th Cir. 1979); *Executive Jet Aviation, Inc. v. United States*, 507 F.2d 508, 514-515 (6th Cir. 1974); *Best Bearings Co. v. United States*, 463 F.2d 1177, 1179 (7th Cir. 1972); *West v. United States*, 592 F.2d 487, 492 (8th Cir. 1979); *Blain v. United States*, 552 F.2d 289, 291 (9th Cir. 1977) (per curiam); *Three-M Enterprises v. United States*, 548 F.2d 293, 294 (10th Cir. 1977); *Lykins v. Pointer, Inc.*, 725 F.2d 645, 646 (11th Cir. 1984); *Dancy v. United States*, 668 F.2d 1224, 1227 (Ct. Cl. 1982); *McWhirter Distributing Co. v. Texaco, Inc.*, 668 F.2d 511, 527 (Temp. Emer. Ct. App. 1981).

manded with instructions to affirm the dismissal of the Takings Clause claims. The court of appeals clearly erred in holding timely respondents' suit against the United States seeking compensation for property allegedly lost 40 years earlier as a result of the World War II relocation of persons of Japanese ancestry.

We do not dispute that, as President Ford proclaimed in 1976 (Proclamation No. 4417, 41 Fed. Reg. 7741 (1976)), the wartime measures out of which this case arose were "a setback to fundamental American principles" and involved "national mistakes." Nonetheless, like all who have suffered wrongs, respondents were obliged to pursue their claims diligently. The limitations period applicable to a suit against the United States "constitutes a condition on the waiver of sovereign immunity" and, as such, "define[s] the extent of the court's jurisdiction" over a claim. *United States v. Mottaz*, slip op. 6 (quotation marks and citations omitted); *United States v. Kubrick*, 444 U.S. 111, 117-118 (1979). The statute of limitations (here, 28 U.S.C. 2401(a)) "must be strictly observed," and may not be interpreted "in a manner that would 'extend the waiver [of sovereign immunity] beyond that which Congress intended'" (*Block v. North Dakota*, 461 U.S. 273, 287 (1983) (quoting *Kubrick*, 444 U.S. at 118)).

Section 2401(a) purports on its face to bar a civil suit "if the right to bring it first accrued more than six years prior to the date of filing the suit." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 510 (1967). As to when the right first accrues, the issue is when respondents could, "with honesty, make the necessary allegations to support an action" (*id.* at 515; see also *Finn v. United States*, 123 U.S. 227, 232 (1887)). In general, a claim founded on the Takings Clause can be asserted as of "the date \* \* \*

the \* \* \* taking occurred." *Soriano v. United States*, 352 U.S. 270, 277 (1957); see also *United States v. Dow*, 357 U.S. 17 (1958). Respondents' allegations that a taking "occurred during World War II" (J.A. 137), when their "property [was] lost as a result" of the evacuation and exclusion orders (J.A. 131), seemingly could have been asserted when "it was first clearly apparent" that the government's actions had caused the alleged loss. *Todd v. United States*, 292 F.2d 841, 844 (Ct. Cl. 1961) (Takings Clause claim based on promulgation of restrictions by Secretary of War accrued when it first became apparent that the restrictions had frustrated the plaintiff's operations). Because respondents must have had knowledge of their "injury [and] its cause" (*Kubrick*, 444 U.S. at 122) not later than the termination of the relocation program, the six-year statute of limitations on the claims that they now advance ordinarily would have expired sometime between 1948 and 1952.

The court of appeals, however, concluded that the government "misled the Supreme Court" when it argued the constitutionality of the evacuation (J.A. 23), and that this Court in *Hirabayashi* and *Korematsu* announced a "virtually insurmountable presumption of deference" (J.A. 18) in connection with the relocation program. The court below concluded that the statute of limitations should be tolled until the rule of deference thus announced had been somehow overcome, so that respondents could "survive a threshold motion to dismiss" and thus "advance beyond the pleading stage" (J.A. 53 & n.57). The court concluded that not until 1980, with the creation of the Commission on Wartime Relocation and Internment of Civilians, could respondents have "produced the 'factual basis' of a good faith complaint" (J.A. 53).

In all of this reasoning, the court of appeals is demonstrably wrong.

#### A. The Statute of Limitations on Respondents' Takings Clause Claims Was Never Tolled

Although the government had in its possession materials about the evacuation that it did not present to this Court while litigating *Hirabayashi* and *Korematsu*, those materials did not contradict the government's factual assertions to this Court. The government did not mislead the Court. Furthermore, nothing in the decisions in *Hirabayashi v. United States*, *supra*, and *Korematsu v. United States*, *supra*, suggests that a Takings Clause claim would have been futile or excuses respondents' failure to bring such an action within six years of the alleged takings.

##### 1. The Government Did Not Mislead This Court While Defending the Evacuation

In justifying the evacuation before this Court, the United States made a claim of "military necessity." The "military necessity" of the evacuation was, of course, a conclusion to be drawn or rejected in light of the facts, not a "fact" whose "concealment" might toll the statute of limitations. Although official and unofficial opinion on the subject may have changed since the 1940s,<sup>25</sup> whether there was military necessity for the evacuation remains a question of opinion and judgment based on the facts, rather than a question of fact. Indeed, the court of appeals recognized that this Court "did not lack for evidence arguing against the military judgment" (J.A. 56).

In support of its assertion of "military necessity," the United States could have resorted to two types of arguments—those looking to ancestral, cultural, and ethnic considerations, and drawing an inference about

<sup>25</sup> But see *Personal Justice Denied* 383-384 n.191 (quoting testimony of John J. McCloy before Commission).



the likelihood of subversive activity, or those resting on specific conduct alleged to be indicative of past or planned subversive activity. With one exception,<sup>26</sup> the government's factual claims—and this Court's—fell entirely into the former category. See Brief for the United States at 18-32, *Hirabayashi*; *Hirabayashi*, 320 U.S. at 90-91, 96-99, 101; Brief for the United States at 11-12, 21-23, 26, 54-55 & n.28, *Korematsu*; *Korematsu*, 323 U.S. at 218-219; *Personal Justice Denied* 50 (footnote omitted) (“[t]he Justice Department, defending the exclusion before the Supreme Court, made no claim that there was identifiable subversive activity”); J. tenBroek, E. Barnhart & F. Matson, *supra* note 26, at 215-216, 265-266; Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L.J. 489, 505, 507 (1945).

Allegations of misconduct by the government stem from the fact that, by the time of *Korematsu*, there was in existence and public circulation a document, General DeWitt's *Final Report*, that purported to find evidence of subversive activity by Japanese-Americans in certain unidentified shore-to-ship signaling on the West Coast. At that time, the government had in its possession the Fly and Hoover memo-

<sup>26</sup> The one exception is the government's—and the Court's—inference of subversiveness from the fact that “[a]pproximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.” *Korematsu*, 323 U.S. at 219 (footnote omitted); see Brief for the United States at 54-55 & n.28, *Korematsu*. One certainly may question the validity of the inference drawn from the uncontested facts stated, but there is no basis to suggest that the government concealed anything that would help anyone to argue against that inference. See J. tenBroek, E. Barnhart & F. Matson, *Prejudice, War and the Constitution* 285-286 (1954).

landa (see p. 10, *supra*), which called into question assertions in the *Final Report* about signaling, and therefore it would have been questionable to cite the *Final Report* on those points without disclosing the contradictory information. The government, however, expressly disclaimed any reliance on the *Final Report* insofar as it went beyond the inferential arguments specifically set forth in the brief (Brief for the United States at 11 n.2, *Korematsu* (emphasis added)):

The Final Report of General DeWitt (which is dated June 5, 1943, but which was not made public until January 1944), hereinafter cited as *Final Report*, is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the *Final* [sic] Report only to the extent that it relates to such facts.

This explicit dis-incorporation of the more colorful allegations of the *Final Report* was clearly understood by the other litigants and by the Court.<sup>27</sup> Although some Department of Justice attorneys had urged a footnote that more specifically indicated why the government limited its reliance on the *Final Re-*

<sup>27</sup> See, e.g., Brief of the American Civil Liberties Union, Amicus Curiae, at 21, *Korematsu* (describing footnote as a “singular repudiation of General DeWitt’s testimony on the military necessities, which obviously could be required only by the existence of reliable conflicting information from other sources,” and specifying factual assertions, including radio signaling, contained in *Final Report* but not government’s brief); Rostow, *supra* p. 32, 54 Yale L.J. at 520; *Personal Justice Denied* 88 (footnote omitted) (“in its brief to the Supreme Court the Justice Department was careful not to rely on DeWitt’s *Final Report* as a factual basis for the military decision it had to defend”).

port (see J.A. 272-276 (Ennis memorandum); J.A. 25), the footnote that actually appeared in the brief was not "ambiguous," as the court below described it (J.A. 25), and it certainly did not amount to a "suppression \* \* \* of the factual weakness" of the report (J.A. 57 n.62). In support of its statements to that effect, the court of appeals claimed that in *Korematsu* "the majority opinion freely cited to the *Final Report*" and that, "[f]or the *Korematsu* majority, DeWitt's statement was the official view of one of the 'war-making branches'" and thus entitled to deference (J.A. 26 & n.20 (citation omitted)). The *Korematsu* opinion, however, contains not the slightest support for those claims. Consistent with the government's disclaimer, the opinion of the Court cited the *Final Report* once (323 U.S. at 219 n.2), and there only for the correct proposition that "investigations made subsequent to the exclusion" showed that some evacuees "refused to swear unqualified allegiance to the United States" and that others "requested repatriation to Japan" (*id.* at 219 (footnote omitted); see J.A. 24 n.19). The Court did not rely on General DeWitt's claims about shore-to-ship signaling by Japanese-Americans. Indeed, the only substantive discussion of the *Final Report* in *Korematsu* is found in the dissent by Justice Murphy, who extensively used the *Final Report* to argue that the evacuation was supported only by racist motives (323 U.S. at 235-239).<sup>28</sup>

NO. — <sup>28</sup> Thus, to the extent that the Court may have shown some deference to the judgment of the political branches, it clearly did not defer to General DeWitt. Rather, it deferred to the judgment of President Roosevelt (who issued Executive Order 9066 and, well after General DeWitt began issuing public proclamations, issued Executive Order No. 9102 creating the War Relocation Authority) and Congress (which passed the Act of March 21, 1942, three days after Executive Order No. 9102).

Perhaps realizing that the nondisclosure of the Fly and Hoover memoranda really could not amount to fraudulent concealment, because the assertion that they contradicted was one that the government did not make, the court of appeals also found possible fraudulent concealment in the government's failure to announce that its conclusions about the Japanese-American population were not supported by intelligence reports.<sup>29</sup> Indeed, the court of appeals ultimately acknowledged that its entire theory rested on that failure, for the court left open the possibility that, on remand to the district court, the government might produce "countervailing intelligence data," in which case the district court "would be free to find that the statute of limitations was never tolled in this case" (J.A. 57 n.63).

The government, however, made no claim that its conclusions about the Japanese-American population *were* supported by intelligence reports, and the absence of such a claim by the government was duly noted at the time. See, e.g., Brief for American Civil Liberties Union, Amicus Curiae, at 23, *Korematsu*; Dembitz, *Racial Discrimination and the Military*

<sup>29</sup> The court of appeals explicitly recognized that nondisclosure of the Ringle report, in which an intelligence officer with some experience argued that Japanese-Americans did not pose a threat, was not by itself sufficient to toll the statute of limitations (J.A. 56 n.62; see also J.A. 23 & n.17). Indeed, the truth is that the substance of the Ringle report was available to any litigant who wished to use it, and some did (see note 30, *infra*). In fact, the "anonymous" version of the Ringle report was cited in the government's briefs in both *Hirabayashi* (at 29 n.46) and *Korematsu* (at 12 n.3), albeit not for the propositions that the court of appeals emphasized. The court of appeals insisted, however, that the result in *Korematsu* would have been different if the government had not "conceal[ed] \* \* \* the fact that there were no intelligence reports contradicting Ringle" (J.A. 57; see also J.A. 22-23).



*Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 Colum. L. Rev. 175, 191 n.55 (1945). Nor do this Court's opinions in *Korematsu* and *Hirabayashi* suggest that the decisions were influenced by a false belief that undisclosed "official intelligence analysis" (J.A. 23) supported its conclusions about the Japanese-American population.<sup>30</sup> Rather, like the wartime government, this Court squarely based its decisions on what it then perceived as "the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of dan-

<sup>30</sup> If, as the court of appeals claimed, the entire case in *Korematsu* had turned on whether there were any such reports, at oral argument the Court surely would have taken the *explicit* invitation of the Brief of the American Civil Liberties Union, Amicus Curiae, at 23 n.11, to demand of the government whether there were intelligence reports contradicting the Ringle report, whose substance had appeared in *Harper's* as the work of an unidentified "intelligence officer." See also Brief of the Japanese American Citizens League, Amicus Curiae, at 107-108 (discussing substance of *Harper's* article); *id.* at 126-127 (ascribing to Ringle, by name, "faith" in Japanese-Americans "based on the widest knowledge obtainable"). In addition, if the precise authorship of the *Harper's* article mattered, the Court could have learned from C. McWilliams, *Prejudice* 114, 182-183 & n.15 (1944), that Ringle was the author. That book was available to the *Korematsu* Court and was cited in Justice Murphy's dissent (323 U.S. at 237-239 nn.6, 7, 9 & 12).

Since World War II, certain intelligence data have come to light, which existed before Pearl Harbor but were unknown to the Justice Department at the time of briefing and argument of *Hirabayashi* and *Korematsu*, which might be taken to controvert certain conclusions of the Ringle report. See, e.g., *Japanese-American and Aleutian Wartime Relocation: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 493-499, 504-529 (1984). It is unclear what role this information may have played in the formulation of the relocation program.

ger than those of a different ancestry" (*Hirabayashi*, 320 U.S. at 101). There is nothing in the Court's opinions to suggest that the Court relied on any assumptions about intelligence analyses that the government never claimed existed.

Whether or not one agrees with the government's wartime position that ancestral, ethnic, and cultural background may give rise to a greater likelihood of subversive activity, or with the Court's view in *Hirabayashi* and *Korematsu* that a mass evacuation was constitutionally justifiable on the basis of such assertions, neither the government's position nor the Court's decisions relied on intelligence reports or on parts of General DeWitt's *Final Report* that were contradicted by undisclosed evidence uniquely in the government's possession. The government's factual and legal assertions were sharply contested in the 200-page amicus brief of the Japanese American Citizens League (among others) and in the three dissenting opinions in this Court. But neither controversial assertions of fact, by themselves, nor controversial assertions of law, in any circumstances, constitute fraudulent concealment. Such controversial assertions are all that was present in the litigation of *Hirabayashi* and *Korematsu*.

## 2. *The Holdings in Hirabayashi and Korematsu Did Not Justify A Delay in Bringing Takings Clause Claims*

Even if one assumes that the government committed improprieties that were somehow responsible for the results reached in *Hirabayashi* and *Korematsu*, respondents cannot prevail because neither decision foreclosed an action for a taking of property.<sup>31</sup> To the contrary, in both decisions this Court

<sup>31</sup> In fact, the court of appeals itself did not rely on language in this Court's opinions in concluding that *Hirabayashi* and *Korematsu* would have precluded Takings Clause claims,

emphasized the narrowness of its ruling—which was limited, in *Hirabayashi*, to sustaining a “curfew order” (320 U.S. at 105) and, in *Korematsu*, to upholding “temporary exclusion” of Japanese-Americans from a restricted area “as of the time [that the order] was made and when the petitioner violated it” (323 U.S. at 219).<sup>32</sup> To extrapolate from these carefully limited rulings a conclusion that “the government could have won a takings suit on the claim

but rather looked to the construction that “the Attorney General and Congress” supposedly placed on those decisions (J.A. 31). There is, of course, no particular reason to assume that the courts would have been bound by any construction that the nonjudicial branches may have placed on the decisions of this Court (see J.A. 92 n.3 (dissent)). Indeed, one of the many ironies in the approach taken below is the court’s contradictory interpretations of the 1948 and 1980 legislation. The 1948 Evacuation Claims Act is said to prove that respondents had no Takings Clause claim at that time because Congress thought that they had no such claim, yet the 1980 legislation—by a Congress that just as clearly contemplated legislative rather than judicial redress—is said to represent a confession that the evacuation was “legal error” (J.A. 60 & n.67) and is held to give respondents a previously nonexistent Takings Clause claim.

<sup>32</sup> The judges in the panel majority, in response to the dissent from denial of rehearing en banc, insisted that *Hirabayashi* and *Korematsu* contained a “situation-specific holding \* \* \* [that] courts must defer to the judgment of Congress and the Executive that sufficient military necessity existed to justify the World War II internment policy” (J.A. 103 (emphasis partially omitted)). Among other defects, that statement describes as this Court’s “holding” a resolution of the issue that this Court expressly reserved: whether “confinement” (*Hirabayashi*, 320 U.S. at 105) and “detention” (*Korematsu*, 323 U.S. at 222) as well as exclusion and curfew orders were justified. The *Korematsu* Court wrote, “we are dealing specifically with nothing but an exclusion order” and described as “momentous” and “serious” the questions it did not reach concerning the legality of assembly or relocation orders (*id.* at 222-223).

of military necessity \* \* \* simply by citing *Korematsu* and moving to dismiss” (J.A. 92 (dissent)) is no small step.

The court of appeals sought to justify that step by stating that, “[w]hen the government impinges on property rights in the midst of a military emergency, there is no compensable taking under the Fifth Amendment” (J.A. 55). But the doctrine that, in a military emergency, property can be destroyed without compensation is a narrowly tailored exception to the general rule that “a taking of private property \* \* \* when the emergency of the public service in time of war \* \* \* is too urgent to admit of delay \* \* \* creates an obligation on the part of the government to reimburse.” *United States v. Russell*, 80 U.S. (13 Wall.) 623, 629 (1871). It has been limited almost exclusively to the “extraordinary situation” (*United States v. Central Eureka Mining Co.*, 357 U.S. 155, 182 (1958) (Harlan, J., dissenting)) where property is destroyed “by the operations of armies in the field” (*United States v. Pacific Railroad*, 120 U.S. 227, 239 (1887)) in order “to prevent the enemy from using it” (*United States v. Caltex, Inc.*, 344 U.S. 149, 153 (1952)).<sup>33</sup>

In fact, evacuees were told that the government would “[p]rovide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property” (J.A. 262); that the govern-

<sup>33</sup> When this defect in the court’s analysis was pointed out by dissenters (J.A. 91-92), the panel majority’s only response was that “the taking of property was part and parcel of the internment policy” (J.A. 103-104 n.1). The statement of the panel majority is false. The taking of property was not part and parcel of the evacuation (or “internment”) policy. Moreover, the panel majority’s statement would have no legal significance even if true, for the idea that this Court would not separately analyze separate parts of the evacuation policy is flatly contradicted by *Korematsu*, 323 U.S. at 221-222.



ment did "not plan to take title to the property of the evacuees," but would "aid [them] in a voluntary liquidation of their property at reasonable prices and \* \* \* protect them against individuals who seek to take advantage of their situation" (J.A. 279); that evacuees could continue to "receive rents, profits, dividends or royalties from businesses or property" and also could "make investments" or "continue business negotiations" (J.A. 289); and that "furniture and household articles" would be shipped at the government's expense to those evacuees who so desired (J.A. 295).<sup>34</sup> The government thus disclaimed the necessity for, and made provisions (albeit inadequate) to avoid, takings of property. It could not and did not, at the same time, assert a rationale of "military necessity" to justify the destruction of property without compensation. Cf. p. 5, *supra* (government publicly recognized, in 1947, that its steps to protect evacuees' property had been unsuccessful and that monetary redress was therefore appropriate).

Accordingly, even if the government engaged in the "fraudulent concealment" suggested by the court of appeals, the statute of limitations was never tolled because *Hirabayashi* and *Korematsu* did not foreclose a Takings Clause claim. Any speculative possibility that this Court might have held such claims barred is no basis to excuse respondents from pursuing their actions for 40 years.

<sup>34</sup> To the extent that evacuees relied on such undertakings and yet nonetheless lost property, they might indeed—as respondents further claimed in their complaint—have had claims against the government under theories of contract or bailment (see J.A. 39). The court of appeals, however, correctly held that the statute of limitations would have run on any such claims, because the existence of a military justification for the evacuation would have been irrelevant to contract and bailment claims (J.A. 61-62).

**B. If the Statute of Limitations Was Ever Tolled, the Tolling Ended More Than Six Years Before This Action Was Filed**

The court of appeals concluded that, notwithstanding public knowledge of all of the relevant facts, the statute of limitations was tolled until there was an official concession that the wartime evacuation was unjustified. The public availability of all relevant facts no later than 1950, however, meant that the statute of limitations at least began to run at that time. And, even if the Court were to overlook all of the errors of the court of appeals, it would still be apparent that the statute of limitations began to run no later than the date of President Ford's proclamation in 1976.

**1. There Is No Plausible Reason Why Respondents Could Not Have Asserted Their Claims Many Years Ago**

When a statute of limitations is tolled, the tolling does not last until whatever moment the plaintiff decides to bring suit. Rather, the tolling suspends the statute of limitations as against a plaintiff who is "blameless[ly] ignoran[t]" (*Urie v. Thompson*, 337 U.S. 163, 170 (1949)) of his claim until he is reasonably chargeable with notice of those facts that are required to plead a right of action. Once an injured party knows or ought to know facts alleged to have been concealed, he must decide, within the period of the statute of limitations, "whether to sue or not" (*Kubrick*, 444 U.S. at 124).<sup>35</sup>

<sup>35</sup> The statute of limitations on actions brought by the government, 28 U.S.C. 2416(c), makes explicit that it is tolled while "facts material to the right of action are not known and reasonably could not be known" (emphasis added). The legislative history of this provision states that the unknown "material facts" underlying a tolling "must go to the very essence of the right of action" (S. Rep. 1328, 89th Cong., 2d Sess. 6 (1966)) and explains that "the principal applica-

a. The court of appeals did "not dispute the District Court's reading of the historical record" (J.A. 55 (footnote omitted)), in which that court found that *all* of the arguably material evidence that was not disclosed to this Court "became public and [was] available to diligent plaintiffs from the late 1940's onward" (J.A. 146).<sup>30</sup> Thus, as the dissenters below

tion of this exclusion will probably be in connection with fraud situations," such as "where the affirmative act of a wrongdoer has served to conceal the fraudulent act" (*ibid.*).

It appears that Congress, in enacting Section 2416, believed it was duplicating the rule applicable to suits against the government. As this Court noted in *Crown Coat Front Co. v. United States*, 386 U.S. 503, 521 n.14 (1967), the congressional intent behind that Section was "to 'put the Government on a parity with those private litigants who may sue' and 'to equalize the position of litigants'" in suits involving the government. See, *e.g.*, S. Rep. 1328, *supra*, at 2. There is no reason to suppose that a more expansive tolling doctrine might apply to claims against the government, when the relevant statute of limitations contains no authority for any tolling at all.

<sup>30</sup> The Ringle, Fly, and Hoover memoranda were all cited and discussed in M. Grodzins, *Americans Betrayed* (1949). See J.A. 54 n.59; C.A. App. 260-287. The court of appeals conceded that "[a]t the very least [this] should have alerted [respondents] to the need to conduct further inquiries into the factual basis of their claims" (J.A. 55 n.60). Notably, the Grodzins book was followed in the 1950s, 1960s, and 1970s by several other books that discussed the three memoranda; an "incomplete list" appears in the district court's opinion (J.A. 141 n.26). Nor can it be seriously suggested that it was a secret until recently that the government had had the Ringle, Fly, and Hoover memoranda while litigating *Korematsu*. For example, the second volume of the autobiography of the wartime Attorney General openly discusses the Fly and Hoover memoranda and the internal debate within the government about the evacuation. See F. Biddle, *In Brief Authority* 212-226 (1962); see also, *e.g.*, U.S. Dep't of the Interior, War Relocation Authority, *Wartime Exile*,

pointed out, it is "uncontroverted" (J.A. 78 (emphasis omitted)) that "the essential facts for a legal challenge were well known by 1950" (J.A. 88). That should have been enough to end this case.

Faced with that state of affairs, however, the court of appeals abandoned the principle that a plaintiff to whom the relevant facts are available must diligently assert his rights or lose them, and instead held that tolling could be ended by "nothing less than an authoritative statement by one of the political branches, purporting to review the evidence when taken as a whole" and conceding "that there was reason to doubt the basis of the military necessity rationale" (J.A. 56, 59). The court insisted on a confession of "legal error" (J.A. 60 n.67).

This conclusion that a statute of limitations can be tolled until the defendant *admits* wrongdoing is unprecedented. Unless it is a ticket good on this day and train only, the court's reasoning indicates that a plaintiff may wait to file suit, not until he is "aware" that he has been injured "on grounds that he himself consider[s] to be wrong and improper" (*Welcker v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985), cert. denied, No. 84-1960 (Oct. 7, 1985)), but until such time, if ever, as the government publicly confesses that he plaintiff's claim is meritorious.

In conditioning the United States' waiver of sovereign immunity on timely filing of a claim, Congress of course "was entitled to assume that the limitation period it prescribed meant just that period and no more." *Soriano v. United States*, 352 U.S. 270, 276

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*The Exclusion of the Japanese Americans from the West Coast* 145, 154-158 (1946) (quoting Hoover and Fly memoranda). Former Attorney General Biddle, some 25 years ago, also made quite explicit his opinion that the evacuation had not been supported by "military necessity" (F. Biddle, *supra*, at 221).



(1957). A potentially "limitless extension of the period of limitation" (*id.* at 275), like the one posited by the court of appeals in this case, simply cannot be reconciled with the statutory requirement that actions be brought within six years of accrual. See also *Finn v. United States*, 123 U.S. 227 (1887). The very nature of a limitations period is to require a prospective plaintiff to take timely action on his *own* perception that he is the victim of a wrong. Not having done so, respondents cannot resurrect their claims against the government based on *its* later reassessment of its conduct during World War II.

This Court's decision in *United States v. Kubrick*, 444 U.S. 111 (1979), precludes the extraordinary theory of tolling embraced by the court of appeals. In *Kubrick*, this Court specifically rejected the suggestion that "for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment" (444 U.S. at 122), and rejected the theory that a plaintiff must learn that "his injury was legally blameworthy" (*id.* at 121) before a claim will accrue.<sup>37</sup> It "would go far to

<sup>37</sup> The attempt by the court of appeals (J.A. 52 n.56) to distinguish *Kubrick* on the ground that that case did not involve alleged fraudulent concealment is doubly flawed. In the first place, if the court of appeals has correctly equated a mere failure to admit wrongful conduct with fraudulent concealment, then *Kubrick* was indeed, under the court of appeals' own definition, a case involving such concealment, because there the government repeatedly denied any wrongdoing. See *Kubrick*, 444 U.S. at 114-115. Indeed, in *Kubrick*, there was a suggestion that the government may actually have affirmatively tried to mislead the plaintiff by a "fabrication" concerning the cause of his injury (*id.* at 128 (Stevens, J., dissenting)). In the second place, the court of appeals has confused the grounds for tolling a statute of limitations (of which fraudulent concealment is but one variety, blame-

eliminate the statute of limitations as a defense separate from the denial of breach of duty," the Court reasoned, to hold that a claim "accrue[s] only when the plaintiff had reason to suspect or was aware \* \* \* that a legal duty to him had been breached" (444 U.S. at 125). Under the theory of the court of appeals, however, the statute of limitations is tolled precisely as long as the defendant continues a "denial of breach of duty." Only an admission of legal wrongdoing will start it running.

b. The court of appeals sought to justify this obvious departure from settled principles by saying that this Court, in *Hirabayashi* and *Korematsu*, had made the political branches the ultimate arbiters of the "military necessity" rationale for the evacuation, and that therefore any court presented with any claim relating to the evaluation before 1980 would have simply deferred without question to the view of the President and Congress, circa 1942. Tolling must continue, said the court of appeals, "until the 'war-making branches' \* \* \* released the federal courts from the grasp of *Korematsu* and *Hirabayashi* by indicating that deference was no longer due to the war-

less ignorance of injury being another) with what must be discovered to trigger the limitations period. *Kubrick* held that any tolling of the statute of limitations ends when a plaintiff has sufficient notice of the factual basis of his claim to oblige him to make inquiries (see *id.* at 123-124). Here, the court of appeals acknowledged that respondents had such notice more than three decades before they brought suit (see J.A. 55 n.60). "Once [a] plaintiff is on inquiry that it has a potential claim," it is immaterial whether the statute of limitations was previously tolled because "defendant \* \* \* concealed its acts" or because the plaintiff's "injury was 'inherently unknowable,'" and in either case "the statute can start to run." *Japanese War Notes Claimants Association v. United States*, 373 F.2d 356, 359 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967).

time judgment of military necessity for the mass evacuation" (J.A. 103).

It was a contemporary criticism of *Hirabayashi* and *Korematsu* that they did indeed embody excessive deference to military judgment. Commentators immediately urged that "the basic issues should be presented to the Supreme Court again" and that "generous financial indemnity should be sought" (Rostow, *supra* p. 32, 54 Yale L.J. at 533.<sup>38</sup> But the idea that those cases were based on *absolute* capitulation to the political branches no matter what the facts were, and could not be reexamined without the say-so of the political branches, was created out of whole cloth by the court of appeals.

In *Hirabayashi*, this Court "stated in detail facts and circumstances \* \* \* which support[ed] the judgment of the war-waging branches of the Government" that the evacuation was justified, and found that those facts and circumstances "afforded a rational basis for the decision which [was] made" (320 U.S. at 101-102). The relevant circumstances, according to this Court, were "facts of public notoriety" (*id.* at 102), including the events leading to the evacuation order (*id.* at 85-89), congressional findings (*id.* at 89-92), and the "social, economic and political conditions" that "in the particular war setting \* \* \* set [Japanese-Americans] apart from others" (*id.* at 96, 101). "[T]hose facts, and the inferences which could be rationally drawn from them," the Court concluded, provided "adequate support" for the government's actions (*id.* at 103, 105).

<sup>38</sup> Thus, as early as 1945 at least one leading commentator agreed with the district court (J.A. 142) that a litigant could responsibly file suit to challenge *Korematsu* head on. See Rostow, *supra*, at 533 (indicating that this Court can and sometimes will "correct[] a decision occasioned by the excitement of a tense and patriotic moment").

Similarly, in *Korematsu*, this Court cited evidence that tended to "confirm[]" (323 U.S. at 219) "the assumptions upon which [it] rested [its] conclusions in the *Hirabayashi* case" (*id.* at 218). It is one thing to say that, in retrospect, the facts recited could not justify the racial classification that was at issue in those cases. It is quite another to claim that the Court declined to look at the facts and merely deferred to the government's assertion that its conduct was justified.<sup>39</sup>

In further holding that *Hirabayashi* and *Korematsu* demanded absolute judicial deference to the political branches in the context of potential takings claims, the court of appeals also simply ignored a significant body of case law in which this Court demonstrated that "[t]he doors of our courts ha[d] not been shut" to potential plaintiffs in respondents' position. *Ex parte Kawato*, 317 U.S. 69, 78 (1942) (holding that no legal disability barred an evacuee who was a resident alien from prosecuting a civil suit). Indeed, shortly after *Korematsu*, the Court demonstrated in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), that it was willing to overrule a government plea of "military necessity" (327 U.S. at 340 n.1 (Burton, J., dissenting)), when it held that martial law could not be sustained in the Hawaiian

<sup>39</sup> To be sure, that is what the most vehement critics of the Court's opinions claimed. See, e.g., *Korematsu*, 323 U.S. at 245 (Jackson, J., dissenting); Rostow, *supra* p. 32. This Court, however, stated that it was engaging in "the most rigid scrutiny" (*Korematsu*, 323 U.S. at 216). Although lower courts were obliged to follow the *holding* of *Korematsu*—that the *evacuation* was constitutional—nothing would have required them to capitulate to (nonexistent) claims that military necessity justified the taking of property. And this Court, of course, had no obligation even to adhere to *Korematsu* if a timely attempt had been made to challenge it in the context of a Takings Clause claim.



Islands even though "one-third of the civilian population [was] of Japanese descent" (*id.* at 333 (Murphy, J., concurring)). In flat contradiction to the entire theory of the decision below, Chief Justice Stone, citing and contrasting his own opinion for a unanimous Court in *Hirabayashi*, stated: "[E]xecutive action is not proof of its own necessity, and the military's judgment here is not conclusive that every action taken \* \* \* was justified by the exigency" (327 U.S. at 336 (Stone, C.J., concurring)).<sup>40</sup>

This Court also long ago demonstrated that the rights of Japanese-Americans who lost property as a result of World War II measures could be vindicated. See *Honda v. Clark*, 386 U.S. 484 (1967) (suit by Japanese-Americans to recover funds seized under Trading With the Enemy Act); cf. *Oyama v. California*, 332 U.S. 633 (1948); *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948). It is particularly significant that, in 1952, the Court held that resident enemy aliens whose property had been seized during World War II under the Trading with the Enemy Act were entitled to its return, stating that it was "clear \* \* \* that friendly aliens are protected by the Fifth Amendment requirement of just compensation" and that according less protection to resident enemy aliens would pose a "constitutional problem."

<sup>40</sup> The Commission on Wartime Relocation and Internment of Civilians concluded that *Duncan v. Kahanamoku* "effectively overrules one major predicate of the *Korematsu* decision by showing no deference to military judgment when the control of civilians and civilian institutions in uninvaded territory is at stake" (*Personal Justice Denied* 282). There is absolutely no reason why that argument could not have been presented to the courts within six years after *Duncan* was decided; if *Korematsu* did indeed rest on excessive deference to the political branches, that was for this Court to declare in an action timely filed, not for the political branches themselves to conclude decades later.

*Guessefeldt v. McGrath*, 342 U.S. 308, 318-319 (1952); see also *Nagano v. McGrath*, 187 F.2d 759 (7th Cir. 1951) (legal resident of the United States is entitled to return of seized property even though Japan was her actual place of residence both before and during the war), aff'd by an equally divided Court, 342 U.S. 916 (1952). Decisions such as these belie the assertion by the court of appeals that *Hirabayashi* and *Korematsu* constituted an insuperable obstacle to timely assertion of respondents' claims.

In sum, there is no plausible support in *Hirabayashi* and *Korematsu* for the view that respondents could reasonably delay the assertion of their claims until there had been an official public confession of error.

**2. If an Official Statement Concerning the Evacuation Was Necessary to Start the Running of the Statute of Limitations, It Came in 1976**

Even if, as the court of appeals asserted (J.A. 56), "nothing less than an authoritative statement by one of the political branches" could have triggered the statute of limitations on respondents' Takings Clause claims, the requisite statement came in 1976—more than seven years before the complaint in this case was filed. At that time, President Ford formally revoked the Executive Order under which the evacuation program had been carried out, and officially proclaimed: "We now know what we should have known then—not only was that evacuation wrong, but Japanese-Americans were and are loyal Americans." Proclamation No. 4417, 41 Fed. Reg. 7741 (1976).<sup>41</sup>

<sup>41</sup> Other portions of President Ford's strongly worded proclamation are quoted at p. 6, *supra*. The significance of President Ford's proclamation hardly went unnoticed among respondents and the members of their proposed class. Respondent Hohri, in at least one published article, has noted that a

In contrast, all that Congress said in 1980, when it established the Commission on Wartime Relocation and Internment of Civilians to investigate the evacuation program, was that there was a need for "inquiry" and for "study" (J.A. 59-60) "to determine whether any wrong was committed" (S. Rep. 96-751, 96th Cong., 2d Sess. 1 (1980)).<sup>42</sup>

### CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with directions to transfer it to the United States Court of Appeals for the Federal Circuit. If the Court reaches the merits, the judgment of the court of appeals should be reversed.

---

1970 conference, "the first occasion on which I personally recall hearing about reparations," led to the creation of a committee "that sought and realized the issuance" of the Ford proclamation. Hohri, *Redress as a Movement Towards Emfranchisement*, in *Japanese Americans* 196, 197 (R. Daniels, S. Taylor & H. Kitano eds. 1986); see also Minami, *Coram Nobis and Redress*, in *Japanese Americans*, *supra* at 200, 201.

<sup>42</sup> It is important to bear in mind that, under the analysis of the court of appeals, respondents could not bring suit in the absence of an official concession that the evacuation had been wrong. The viability of their case therefore depends both on President Ford's Proclamation not having constituted such a concession and on Congress's 1980 action having constituted such a concession. If President Ford's proclamation truly was not sufficiently authoritative, and if (as respondents have admitted, Br. in Opp. 12) Congress's 1980 action was not a concession of legal error either, then the unmistakable—and absurd—import of the analysis of the court of appeals is that respondents' action is not time barred but *premature*, since all federal courts (including this Court) remain within the "grasp of *Korematsu* and *Hirabayashi*" (J.A. 103) unless and until the President or Congress concedes "legal error" (J.A. 60 n.67).

Respectfully submitted.

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## APPENDIX

28 U.S.C. 1295 provides in pertinent part:

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

\* \* \* \*

(2) of an appeal from a final decision of a district court of the United States \* \* \* if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title \* \* \*.

28 U.S.C. 1346 provides in pertinent part:

(a) The district courts shall have original jurisdiction, concurrent with United States Claims Court, of:

\* \* \* \*

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with United States, or for liquidated or unliquidated damages in cases not sounding in tort \* \* \*.

(1a)

(b) Subject to the provisions of chapter 171 of this title, the district courts \* \* \* shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2401 provides in pertinent part:

(a) \* \* \* [E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues \* \* \*.

28 U.S.C. 2675 provides in pertinent part:

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall first have presented the claim to the appropriate Federal agency \* \* \*.

50 U.S.C. App. 1981 note provides in pertinent part:

SEC. 2. (a) The Congress finds that—

(1) approximately one hundred and twenty thousand civilians were relocated and detained in internment camps pursuant to Executive Order Numbered 9066, issued February 19, 1942, and other associated actions of the Federal Government;

(2) approximately one thousand Aleut civilian American citizens were relocated and, in some cases, detained in internment camps pursuant to directives of United States military forces during World War II and other associated actions of the Federal Government; and

(3) no sufficient inquiry has been made into the matters described in paragraphs (1) and (2).

\* \* \* \* \*

SEC. 3. (a) There is established the Commission on Wartime Relocation and Internment of Civilians (hereinafter referred to as the 'Commission').

\* \* \* \* \*

SEC. 4. (a) It shall be the duty of the Commission to—

(1) review the facts and circumstances surrounding Executive Order Numbered 9066, issued February 19, 1942, and the impact of such Executive order on American citizens and permanent resident aliens;

(2) review directives of United States military forces requiring the relocation and, in some cases, detention in internment camps of American citizens, including Aleut civilians, and per-



manent resident aliens of the Aleutian and Pribilof Islands; and

(3) recommend appropriate remedies.

\* \* \* \* \*

(c) The Commission \* \* \* shall submit a written report of its findings and recommendations to Congress not later than June 30, 1983.

Presidential Proclamation No. 4417, 41 Fed. Reg. 7741 (1976), provides:

#### An American Promise

*By the President of the United States of America*

#### A Proclamation

In this Bicentennial Year, we are commemorating the anniversary dates of many of the great events in American history. An honest reckoning, however, must include a recognition of our national mistakes as well as our national achievements. Learning from our mistakes is not pleasant, but as a great philosopher once admonished, we must do so if we want to avoid repeating them.

February 19th is the anniversary of a sad day in American history. It was on that date in 1942, in the midst of the response to the hostilities that began on December 7, 1941, that Executive Order No. 9066 was issued, subsequently enforced by the criminal penalties of a statute enacted March 21, 1942, resulting in the uprooting of loyal Americans. Over one hundred thousand persons of Japanese ancestry were removed from their homes, detained in special camps, and eventually relocated.

The tremendous effort by the War Relocation Authority and concerned Americans for the welfare of these Japanese-Americans may add perspective to that story, but it does not erase the setback to fundamental American principles. Fortunately, the Japanese-American community in Hawaii was spared the indignities suffered by those on our mainland.

We now know what we should have known then—not only was the evacuation wrong, but Japanese-Americans were and are loyal Americans. On the battlefield and at home, Japanese-Americans—names like Hamada, Mitsumori, Marimoto, Noguchi, Yamasaki, Kido, Munemori and Miyamura—have been and continue to be written in our history for the sacrifice and contributions they have made to the well-being and security of this, our common Nation.

The executive order that was issued on February 19, 1942, was for the sole purpose of prosecuting the war with the Axis Powers, and ceased to be effective with the end of those hostilities. Because there was no formal statement of its termination, however, there is concern among many Japanese-Americans that there may yet be some life in that obsolete document. I think it appropriate, in this our Bicentennial Year, to remove all doubt on that matter, and to make clear our commitment in the future.

NOW, THEREFORE, I, GERALD R. FORD, President of the United States of America, do hereby proclaim that all the authority conferred by Executive Order No. 9066 terminated upon the issuance of Proclamation No. 2714, which

formally proclaimed the cessation of the hostilities of World War II on December 31, 1946.

I call upon the American people to affirm with me this American Promise—that we have learned from the tragedy of that long-ago experience forever to treasure liberty and justice for each individual American, and resolve that this kind of action shall never again be repeated.

IN WITNESS WHEREOF, I have hereunto set my hand this nineteenth day of February in the year of our Lord nineteen hundred seventy-six, and of the Independence of the United States of America the two hundredth.

/s/ Gerald R. Ford



**RESPONDENT'S**

**BRIEF**

6  
No. 86-510

Supreme Court, U.S.

FILED

FEB 17 1987

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

*Petitioner,*

v.

WILLIAM HOHRI, *et al.*,

*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

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## QUESTIONS PRESENTED

I. Does the Federal Courts Improvement Act, 28 U.S.C. §1295(a)(2), bar the United States Court of Appeals for the Federal Circuit from appellate jurisdiction in a case based on both the Federal Tort Claims Act, 28 U.S.C. §1346(b), and the Tucker Act?

II. Did the court of appeals correctly hold that plaintiffs' Takings Clause claims were timely filed in light of governmental fraud and concealment?

## PARTIES TO THE PROCEEDINGS

Respondents (hereinafter "plaintiffs") are William Hohri, Hannah Takagi Holmes, Chizuko Omori (individually and as representative for Haruko Omori), Midori Kimura, Merry Omori, John Omori (individually and as representative for Juro Omori), Gladyce Sumida, Kyoshiro Tokunaga, Tom Nakao, Harry Ueno, Edward Tokeshi, Kinnosuke Hashimoto (represented by Rentaro Hashimoto), Nelson Kitsuse (individually and as representative for Takeshi Kitsuse), Eddie Sato, Sam Ozaki (individually and as representative for Kyujiro Ozaki), Kumao Toda (individually and as representative for Suketaro Toda), Kaz Oshiki, George R. Ikeda, Theresa Takayoshi and Tomeu Takayoshi (represented by Cathy and Tim Takayoshi), and the National Council for Japanese American Redress.

Plaintiffs have requested class certification (an issue not yet determined) for the class of persons defined as follows:

The approximately 120,000 United States citizens and permanent residents, and representatives of such persons no longer living, who during World War II were subjected to forcible segregation, arrest, exclusion, imprisonment, curfew and travel restrictions, deportation, loss of citizenship, or other deprivations of the civil rights and liberties due to the fact of their Japanese ancestry, pursuant to Presidential Proclamation 2525, Executive Order 9066, Public Laws 503 and 405, Presidential Proclamation 2655, or other actions and orders of the United States, its officers, agents, and employees.

Petitioner (defendant below) is the United States of America, referred to herein as the "government."



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

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No. 86-510

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UNITED STATES OF AMERICA,  
*Petitioner,*

v.

WILLIAM HOHRI, *et al.*,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
For the District of Columbia Circuit

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BRIEF FOR RESPONDENTS

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STATEMENT OF THE CASE

On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066, 7 Fed. Reg. 1407 (1942) (JA 259-60), empowering the Secretary of War to exclude "any or all persons" from any designated areas. Pursuant to that Order and implementing legislation, "exclusion orders" were issued banishing plaintiffs—American citizens and permanent residents of Japanese ancestry—from the entire state of California, and major portions of Oregon, Washington, and Arizona, and confining them indefinitely

in segregated prison camps.<sup>1</sup> Plaintiffs, were branded as "enemy aliens and non-aliens," JA 190-91, 261, and were rounded up *en masse* at gunpoint on short notice; orphanages, hospitals, and asylums were raided, JA 189.<sup>2</sup> The alleged military emergency resulted in the virtually complete, catastrophic, and predictable loss of plaintiffs' properties and businesses. "Contraband"—*e.g.*, cameras, radios, and sporting arms—was also confiscated.

Long before these actions, however, military officials had planned to build "concentration camps" to imprison Americans of Japanese ancestry as a strategic ploy to impress Japan with the seriousness of America's preparations for war.<sup>3</sup> In the months following the attack on Pearl Harbor, West Coast politicians pressured War Department officials to take punitive measures toward all Americans of Japanese ancestry on the West Coast, including mass racial exile and imprisonment. JA 184-85.

<sup>1</sup> Government officials also planned to imprison of over 100,000 Americans of Japanese ancestry living in Hawaii, where martial law had actually been imposed, JA 190. This plan was unsuccessful primarily because the large percentage of Americans of Japanese ancestry in the island's population (35%) and their great value as labor made such an effort impracticable. However, over 2,000 Americans of Japanese ancestry were either selectively imprisoned in island camps or deported to mainland prison camps. By contrast, Americans of Japanese ancestry constituted at most 3% of any West Coast state's population, all of whom were imprisoned. See, generally, Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (1982), pp. 261-82 (hereinafter, "*Personal Justice Denied*").

<sup>2</sup> "Japanese ancestry" was defined by the military commander as "any person who has a Japanese ancestor, regardless of degree." U.S. Army, Western Defense Command, *Final Report: Japanese Evacuation from the West Coast 1942* (1943), p. 514 (emphasis added) (hereinafter, "*Final Report*").

<sup>3</sup> See, *e.g.*, Memorandum from Secretary of the Navy Knox to President Roosevelt, October 9, 1940, JA 219, and Memorandum from President Roosevelt to Chief of Naval Operations, August 10, 1936, JA 221.

The War Department subsequently designated the eight westernmost states as the "Western Defense Command," a theatre of combat operations, with General John L. DeWitt as commanding officer. JA 186. On February 14, 1942, General DeWitt issued his "Final Recommendation" to the President, urging that mass actions be taken against all Americans of Japanese ancestry, purportedly to prevent espionage and sabotage. JA 250-58. General DeWitt claimed that individual treatment was not feasible, because the Japanese race was "an enemy race" whose "racial strains are undiluted," despite their United States citizenship, JA 251-52:

It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies of Japanese extraction, are at large today. There are indications that these are organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.

In the midst of the seizures of plaintiffs' persons and property, however, and prior to plaintiffs' imprisonment in permanent camps, American forces were victorious at the Battle of Midway, June 6, 1942, destroying the heart of the Imperial Japanese aircraft carrier fleet and ending any realistic threat of West Coast invasion. *Personal Justice Denied*, p. 12.

There were many contemporaneous legal challenges to the government's actions, but the challenges were repeatedly denied by this Court and lower federal courts, based on the government's claim of "military necessity."<sup>4</sup>

<sup>4</sup> See challenges to the mass racial curfews, *Hirabayashi v. United States*, 46 F.Supp. 657 (W.D. Wash. 1942), *aff'd* 320 U.S. 81 (1943); *Yasui v. United States*, 48 F.Supp. 40 (N.D.Ore. 1942), *on remand*, 51 F.Supp. 234 (N.D.Ore. 1942), *modified*, 320 U.S. 115 (1943); *Ex Parte Ventura*, 44 F.Supp. 520 (W.D. Wash. 1942); *habeas corpus*, injunctive



Throughout the challenges, the government failed to disclose there were no intelligence reports supporting its actions; that all reports the government had were to the contrary; and that there was no factual basis for the claim of "military necessity." Despite vigorous arguments alleging that the government's actions were racist, taken in bad faith, and lacked any factual support, this Court three times rejected any implication of racism and deferred to the government's factual claim of "military necessity." *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); and *Yasui v. United States*, 320 U.S. 115 (1943).

Following the end of the war, legal challenges to the wartime actions continued to be rejected by the courts (n.

actions, and other challenges to the mass and individual exclusion orders against Americans of Japanese ancestry, *Korematsu v. United States*, 140 F.2d 289 (9th Cir. 1943), *aff'd*, 323 U.S. 214 (1944); *Ex Parte Kanai*, 46 F.Supp. 286 (E.D. Wis. 1942); *Ochikubo v. Bonesteel*, 60 F.Supp. 916 (S.D. Cal. 1945); *habeas corpus* challenges to the mass imprisonment of American citizens without trial, *Ex Parte Endo*, 323 U.S. 283 (1944) (involving two and one half years of delay prior to this Court's ruling ordering petitioner's release on statutory interpretation grounds because the government expressly conceded her loyalty, but in *dicta* continuing to cite with approval the military necessity rationale); challenges to the Government's coerced "renunciations" of American citizenship of Japanese Americans, *Abo v. Clark*, 77 F.Supp. 806 (N.D. Cal. 1948), *modified*, 186 F.2d 766 (9th Cir. 1951), *cert. denied*, 342 U.S. 832 (1951); *Acheson v. Murakami*, 176 F.2d 953 (9th Cir. 1949); *Inouye v. Clark*, 73 F.Supp. 1000 (S.D. Cal. 1947), *rev'd*, 175 F.2d 740 (9th Cir. 1949); *Murata v. Acheson*, 99 F.Supp. 591 (D.Haw. 1951), *rev'd per curiam*, 342 U.S. 900 (1951); *Okimura v. Acheson*, 99 F.Supp. 587 (D.Haw. 1951), *rev'd per curiam*, 342 U.S. 899 (1951); *habeas corpus* challenge of internment and deportation following the end of the war, *Ex Parte Arakawa*, 79 F.Supp. 468 (D.Pa. 1947); and challenges to convictions for failure to comply with compulsory draft procedures in the camps on the basis that mass racial imprisonment was unconstitutional, *Fujii v. United States*, 148 F.2d 298 (10th Cir. 1945); *Takeguma v. United States*, 156 F.2d 437 (9th Cir. 1946); *United States v. Kuwabara*, 56 F.Supp. 716 (N.D. Cal. 1944). There were dozens of other cases, reported and unreported, denying relief in similar challenges.

4, *supra*), and efforts were begun in Congress to recognize some of the extraordinary economic losses visited upon Americans of Japanese ancestry. Although continuing to proclaim the validity of the "military necessity" which caused the losses, and recognizing the absence of any other avenue of redress, Congress in 1948 enacted the Japanese-American Evacuation Claims Act, 62 Stat. 1231, 50 U.S.C. App. §§1981-1987, (hereinafter "1948 Claims Act") as a "bounty" for a limited variety of economic losses.<sup>5</sup> Thousands of claims were filed under the 1948 Claims Act. Many were for losses cognizable under the Takings Clause, but were denied because the 1948 Claims Act was a narrow remedy and because "military necessity" gave rise to no "actionable wrongs" or Takings.<sup>6</sup> E.O. 9066 was finally repealed by President Ford in a 1976 proclamation which reiterated that E.O. 9066 "was for the sole purpose of prosecuting the war with the Axis Powers . . . ." Presidential Proclamation No. 4417, 41 Fed. Reg. 7741 (1976).

<sup>5</sup> Floor debate concerning the 1948 Claims Act described the government's actions as based on "military necessity," with no reason to question the good faith of the people involved. 92 Cong. Rec. 9871-73 (daily ed., July 23, 1947). Subsequent amendments to the 1948 Claims Act continued to reiterate Congress' reliance on "military necessity" for the wartime actions. S. Rep. No. 601, 82nd Cong., 1st Sess., reprinted in 1951 U.S. Code Cong. & Ad. News 1693.

The chief military justification for the removal of these people was the war with Japan, the possibility of the existence of a disloyal element in their midst, the critical military situation in the Pacific which increased uneasiness over the possibility of espionage and sabotage, and the lack of time and facilities for individual loyalty screening.

*Japanese American Evacuation Claims: Hearings on H.R. 7763 before Subcomm. No. 2, House Comm. on Judiciary, 84th Cong., 1st Sess., at 2 (1955) (Statement of Subcommittee Chairman Thomas J. Lane).*

<sup>6</sup> *Claim of Mary Sogawa*, reported in *Adjudications of the Attorney General of the United States—Volume I: Precedent Decisions under the Japanese-American Evacuation Claims Act 1950-1956 (1956) (hereinafter "Attorney General Precedent Decisions")*, p. 126.

In July, 1980, Congress created the Commission on War-time Relocation and Internment of Civilians (hereinafter, the "Commission"), to review the "facts and circumstances surrounding [E.O.] 9066," and its impact on Americans of Japanese descent. Congress found that "no sufficient inquiry has been made into [those facts.]" Pub. L. No. 96-317, 50 U.S.C. App. 1981 note, §2(a). The Commission's work entailed three years of hearings, hundreds of witnesses, governmental testimony, and extensive archival research into unpublished documents, at a cost of over one million dollars. In its Report, *Personal Justice Denied* (dated December 1982, released February 1983), the Commission found that "military necessity" did *not* warrant the mass wartime actions; that those actions were *contrary* to all authoritative intelligence reports in the government's possession; and that the actions were not even based on a consideration of any military factors:

The promulgation of Executive Order 9066 was not justified by military necessity, and the decisions which followed from it—detention, ending detention and ending exclusion—were not driven by analysis of military conditions. The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership. Widespread ignorance of Japanese Americans contributed to a policy conceived in haste and executed in an atmosphere of fear and anger at Japan. A grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II.

*Personal Justice Denied*, p. 18.

Simultaneously with the Commission's work, internal Department of Justice memoranda were discovered in late 1981 regarding the wartime cases. See Affidavit of Peter

Irons, JA 300-08. These archival documents showed that responsible government officials *actually knew during the war* that there was no factual justification for the claim of "military necessity," and *knew* the exclusion and detention program could be invalidated as discriminatory. JA 264-76. The documents further showed that the government deliberately concealed this crucial evidence from this Court, and intentionally obstructed plaintiffs' rights to judicial redress for the government's wrongful actions.

Based on this evidence—showing that the government was not merely wrong in its judgment, but duplicitous on an unprecedented scale—plaintiffs filed suit in March, 1983. They asserted twenty-two claims for compensatory and declaratory relief, including claims under the Fifth Amendment Takings Clause (Count III); numerous other constitutional claims (Counts I-II, IV-XV); tort claims (Counts XV-XX); and claims for breach of contract and fiduciary duty (Counts XXI-XXII).

As plaintiffs pursued their claims, *coram nobis* petitions were filed by Messrs. Korematsu, Hirabayashi, and Yasui, seeking to have their criminal convictions vacated due to the fraud on this Court. The government chose not to contest the claim of fraud, but tried instead to avoid a factual hearing by joining in requests for similar relief. This position, one district court noted, was "tantamount to a confession of error." *Korematsu v. United States*, 584 F.Supp. 1406, 1413 (N.D. Cal. 1984). In all three cases, the courts vacated petitioners' indictments and dismissed their convictions.<sup>7</sup>

<sup>7</sup> *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Yasui v. United States*, Civ.-83-151-BE (Order of January 26, 1984, D. Or.), *appeals pending*, 9th Cir. Nos. 84-3730 and 86-3116; *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986), *appeals pending*, 9th Cir. Nos. 86-3853 and 86-3887.



In the *Korematsu coram nobis* proceeding, the district court found, "The government knowingly withheld information from the courts when they were considering the critical question of military necessity," which "was critical to the Court's determination, [and] peculiarly within the government's knowledge." 584 F.Supp. at 1417, 1420. The *Hirabayashi* court, after a full evidentiary hearing, held that the concealed information "goes to the very heart of the issue before the Supreme Court, that is, the military necessity for the exclusion order," 627 F.Supp. at 1454, and found that the government's failure to disclose the military commander's frank (and racist) reasons for the exclusion order "was an error of the most fundamental character and that petitioner was in fact very seriously prejudiced by that non-disclosure." 627 F.Supp. at 1457. The *coram nobis* petitions were expressly held timely because, before the document discoveries early in the 1980's, "no specific evidence of governmental misconduct [was] available." *Korematsu v. United States*, 584 F.Supp. at 1419. *Accord, Hirabayashi v. United States*, 627 F.Supp. at 1456.

### PROCEEDINGS BELOW

The government moved to dismiss plaintiffs' claims in the district court, citing sovereign immunity and statutes of limitations. Plaintiffs opposed dismissal, asserting that plaintiffs' claims were timely because deliberate governmental fraud and concealment tolled the statutes of limitations until the early 1980's, when direct evidence of the fraud was first uncovered.

The district court found a waiver of sovereign immunity under the Tucker Act for plaintiffs' Takings Clause claim (Count III), and concluded that the government had indeed concealed and misrepresented critical intelligence information before this Court during the war.

"It is *undisputed* that reports from the FCC, the FBI, and Naval Intelligence contradicting the claim of military necessity *were concealed by defendant* throughout the war, as most graphically illustrated by the Ennis and Burling memoranda [JA 264-276] urging the disclosure of these findings in the *Hirabayashi* and *Korematsu* briefs." [JA 140, emphasis added.]

The district court further noted that these internal governmental memoranda "fully justify the condemnation of the wartime Department of Justice voiced by the Commission and the plaintiffs" JA 144. Without any evidentiary hearing, however, the district court held that several scholarly references in the late 1940's regarding military intelligence which appeared contrary to the determination of military necessity were sufficient to overcome the deference due this Court's wartime decisions, and started the statute of limitations, JA 140-47. The district court therefore held the Takings claims were untimely.

Plaintiffs appealed to the United States Court of Appeals for the District of Columbia Circuit, which reversed the ruling on the statute of limitations. The court held that plaintiffs' Takings claims were timely because plaintiffs could not have overcome the strong deference to the three wartime judgments of this Court upholding the claim of military necessity until Congress' creation of the Commission in 1980.

The court of appeals found that in the wartime cases, the government failed to disclose authoritative intelligence information it held contradicting the claim of military necessity, and that the government further failed to disclose "that there were *no* countervailing professional intelligence analyses justifying the need for a mass evacuation based on race" JA 22. Disclosure of this information "*would* likely have influenced the outcome" of the "military necessity" determination, JA 23, because this Court gave

great deference to the military and Congress—the “war-making branches” JA 19, 26. In *Korematsu and Hirabayashi*, the court below ruled, “the Court erected a virtually insurmountable presumption of deference to the judgment of the military authorities” JA 18. The court of appeals further found that deference continued throughout the 1950’s, when claims for monetary damages were denied because “military necessity” precluded any civil liability by the government. JA 28-32.

Disagreeing with the district court, the court of appeals held that mere disclosure of the existence of three concealed intelligence documents (the Ringle, F.C.C., and FBI reports) after the war did not remove the deference accorded to the military’s own judgment, and was insufficient to begin the statute of limitations: “Any court reviewing such documents would have concluded that it must defer to the judgment of the military authorities who often must be presumed to act on the basis of conflicting reports” JA 58.

The court of appeals concluded that “nothing less than an authoritative statement by one of the political branches, purporting to view the evidence when taken as a whole, could rebut the presumption articulated in *Korematsu*” JA 56. The earliest such statement was in 1980, when Congress created the Commission, which was “a formal statement that Congress no longer believed that the explanation provided by the military authorities for the internment program was adequate and that the issue should be reopened” JA 60.

The court also held it properly exercised jurisdiction pursuant to 28 U.S.C. §1295(a)(2), because plaintiffs’ case was based on both the Federal Tort Claims Act and the Tucker Act. The “except clause” of §1295(a)(2) was intended, the court held, to bar Federal Circuit jurisdiction over tort claims (and other “except clause” claims). The court of appeals ruled plaintiffs’ tort claims were not “friv-

olous” (the district court also had not found them frivolous), so as to divest the regional circuit of jurisdiction, JA 32-35.

## SUMMARY OF ARGUMENT

I. The District of Columbia Circuit properly exercised jurisdiction over plaintiffs’ appeal from the dismissal of their Federal Tort and Tucker Act claims. The Federal Circuit has restricted subject matter jurisdiction, and is expressly barred from hearing Federal Tort claims, pursuant to the “except clause” of 28 U.S.C. §1295(a)(2). Congress intended all appeals involving tort cases to go to the regional courts of appeals, because of the need to apply local law. This bar on Federal Circuit jurisdiction over tort appeals is consistent with the bar on Claims Court jurisdiction over tort cases in the Federal Courts Improvement Act. The government’s position on §1295(a)(2) has now changed three times in this case, and it has twice before conceded the proper jurisdiction of the District of Columbia Circuit. Its position now is transparently a search for an alternate forum.

II. The government’s position on the statute of limitations lacks credibility. The government claims it did not mislead this Court during the wartime cases, but that has been denied by every district court which has examined the newly discovered evidence of fraud, including the district court in this case. These courts have all determined that the government deliberately concealed and misrepresented crucial evidence pertaining to military necessity before this Court.

The court of appeals properly ruled that plaintiffs Takings claims were timely in light of this unprecedented governmental concealment. In the wartime cases this Court created an insurmountable barrier to relitigating the military necessity rationale after the war. During the late 1940’s and the 1950’s, there were numerous claims for



monetary damages that would have been compensable under the Takings Clause, but for the prior findings of military necessity. All such claims were, on that account, held noncompensable, the government's wartime program having given rise to no "actionable wrong."

Plaintiffs could not assert a colorable claim until either one of the political branches itself had undermined the military necessity rationale, or specific evidence of deliberate fraud was discovered. Specific evidence of governmental fraud and concealment before this Court was uncovered only in late 1981. Now that the fraud is known, it would be inequitable to permit the government to hide behind the statute of limitations, especially without a trial on such a fact-based issue.

## ARGUMENT

### I. PLAINTIFFS' APPEAL WAS PROPERLY FILED IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Court of Appeals for the Federal Circuit was created by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (hereinafter the "Federal Courts Act"), 28 U.S.C. §1295. Section 1295(a)(2) of that Act provides:

The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . (2) of an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b) [the Federal Tort Claims Act], 1346(e), or 1346(f) of this title . . . shall be governed by sections 1291, 1292, and 1294 of this title . . . .

The court of appeals properly exercised jurisdiction over plaintiffs' appeal, involving "mixed" cases under both the Federal Tort Claims Act and the Tucker Act. While such mixed cases are not directly mentioned in either the statutory language or the legislative history of the Federal Courts Act, both the Act and its history evince firm congressional intent to bar the Federal Circuit from appeals involving tort cases. Jurisdiction over such cases was intended to remain in the regional courts of appeals.

#### A. The "Except" Clause in 28 U.S.C. §1295(a)(2) was Intended to Bar the Federal Circuit from Hearing Appeals in Federal Tort Claims Act Cases.

Section 1295(a)(2) expressly bars the Federal Circuit from hearing cases based on the Federal Tort Claims Act, 28 U.S.C. §1346(b), or other "except" clause cases. The statute provides that jurisdiction of such cases "shall be governed by sections 1291, 1292, and 1294 of this title"—conferring appellate jurisdiction on the regional courts of appeals. The presence of plaintiffs' Federal Tort claims (Amended Complaint, Counts XV-XX) barred Federal Circuit appellate jurisdiction.

This Court has previously examined the issue of appellate jurisdiction under §1295(a)(2), using the same analysis as employed by the court of appeals here. In *United States v. Mottaz*, 476 U.S. —, 106 S.Ct. 2224 (1986), this Court raised the issue of proper appellate jurisdiction in a case based both on the Tucker Act and other provisions coming within the "except" clause—there, §1346(f). This Court stated, "the Federal Circuit is a court of limited jurisdiction" and §1295(a)(2) "explicitly disclaims Federal Circuit jurisdiction over claims based on §1346(f)" *Id.*, at n. 11. This analysis indicates that Federal Circuit jurisdiction cannot be expanded to include mixed cases involving the "except" clause.<sup>8</sup>

<sup>8</sup> In *Mottaz* this Court also raised the issue whether mixed appeals should be bifurcated. The legislative history is clear that Congress in-

This Court traditionally rejects attempts to enlarge the jurisdiction of the federal courts without express Congressional authorization. In *United States v. King*, 395 U.S. 1 (1969), this Court held that the Court of Claims had no jurisdiction to issue declaratory judgments, because there was no "express language" demonstrating that Congress affirmatively intended such a result. 395 U.S. at 4-5, citing *Twin Cities Properties, Inc. v. United States*, 81 Ct. Cl. 655, 658 (1935).

If Congress had intended to extend the scope of this court's jurisdiction and subject the United States to the declaratory judgment act, we think express language would have been used to do so, and the court is not warranted in assuming an intention to widen its jurisdiction from the general provisions of the act which concerns a proceeding equitable in nature and foreign to any jurisdiction this court has heretofore exercised.

The legislative history of the Federal Courts Act makes it clear that all tort cases are similarly "foreign" to the Federal Circuit, and must continue to be heard solely in the regional circuits:

*... an appeal in a case brought in a district court under sections 1346(a), 1346(b) [Federal Tort Claims Act], or 1346(e), or 1346(c)(f) ... will continue to go to the regional courts of appeals. The Bill modifies section 1346 to bring all other civil cases in which the United States is a defendant*

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tended to avoid bifurcation. First, the Federal Courts Act sought to eliminate the inefficiency, added costs, and uncertainty of dual or bifurcated appeals. H.R. Rep. 97-312, 97th Cong., 1st Sess., p. 41. *Accord, Atari, Inc. v. JS&A Group, Inc.*, 747 F.2d 1422 (Fed. Cir. 1984). Second, the statutory language and the drafters of the Federal Courts Act constantly refer to "case" analysis for appeals, rather than "claim" or "issue" analysis which might legitimize bifurcation.

*under centralized appellate review. Because cases brought under the Federal Tort Claims Act frequently involve the application of State law, those appeals will continue to be brought to the regional courts of appeals.*

S. Rep. 97-275, 97th Cong., 1st Sess., p.20 (emphasis added). Almost identical language is found in the House report. H. R. Rep. 97-312, 97th Cong., 1st Sess., p. 42. All eight versions of the Federal Courts Act considered by Congress prohibited Federal Circuit jurisdiction over tort cases. Brief for the United States, at 22. In short, Congress never proposed or contemplated that the Federal Circuit would hear Tort Claims cases. Every expression of intent is to the contrary.

The exclusion of tort cases from Federal Circuit jurisdiction is consistent with the exclusion of such cases from the jurisdiction of the U.S. Claims Court (formerly the Court of Claims), pursuant to former law as well as the Federal Courts Act. *See*, 28 U.S.C. §§1346(b); §1491. Indeed, the Court of Claims had *never* heard a case based on the Federal Tort Claims Act. S. Rep. 97-275, 97th Cong., 1st Sess., p. 22; H. R. Rep. 97-312, 97th Cong., 1st Sess., p. 42. The Federal Courts Act even removed a vestigial provision for consensual appeals to the Court of Claims in tort cases, 28 U.S.C. §1504, S. Rep. 97-275, p.22; H.R. Rep. 97-312, p. 45.

The Federal Courts Act therefore must be read to bar Federal Circuit jurisdiction over appeals involving any Federal Tort cases, even if Tucker Act cases would otherwise go to the Federal Circuit. As the court of appeals noted, JA 34-35, had Congress intended the "except" clause in section 1295(a)(2) to apply only to cases based *solely* on Federal Tort claims, Congress would have said so expressly, as it did in the immediately preceding subsection of the Federal Courts Act, §1295(a)(1), dealing with "pure"



trademark/copyright cases, as opposed to mixed patent/trademark cases:

The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction [over appeals from the district courts] if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights or trademarks *and no other claims* under section 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title. [§1295(a)(1), emphasis added.]

In §1295(a)(2), however, Congress provided a broader "except" clause, prohibiting Federal Circuit jurisdiction over Federal Tort cases, whether they were or were not joined with Tucker Act claims. Under §1295(a)(2) such mixed cases were intended to be governed by the "except" clause, and thus are properly within the jurisdiction of the regional courts of appeals.

This construction also gives meaning to the Federal Circuit's jurisdiction over cases "based, in whole or in part, on [the Tucker Act]." That language provides pendent Federal Circuit jurisdiction for *non*-"except clause" claims which are joined in cases where the Federal Circuit is the intended appellate forum. Congress, however, clearly viewed tort, tax, and quiet title cases ("except" clause cases) in a special category, and therefore expressly withheld appellate jurisdiction over all such cases from the Federal Circuit.

The government argues that the grant of Federal Circuit jurisdiction over any case "based in whole or in part" on the Tucker Act means that the "except clause" can be ignored if a Federal Tort case is also based in part on the Tucker Act. This reading would render the except clause meaningless in mixed Tucker Act/Federal Tort cases. The statute should be interpreted in keeping with the core

of Congress' intent. Given the undisputed congressional directive that the Federal Circuit should not hear Federal Tort cases, plaintiffs' construction is more consistent with congressional intent than the government's.

While the government selectively quotes legislative history concerning congressional intentions for uniformity, Congress' concern was focused on circuit court conflicts in patent cases, which was the actual impetus for creation of the Federal Circuit. H. R. Rep. 97-312, 97th Cong., 1st Sess., pp. 18-22; *Court of Appeals for the Federal Circuit-1981: Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981), p. 6 (Statement of Chief Judge Howard Markey). There was no such intention for tort cases, as to which Congress took a different approach.

In any event, ambiguities in the Federal Circuit's jurisdiction must be resolved against such jurisdiction. Congress intended the Federal Circuit to have limited jurisdiction only over the specific subject matters enumerated in the Federal Courts Act.

[The Federal Courts Act] amends section 1291 of Title 28, United States Code, to expressly limit the jurisdiction of the Court of Appeals for the Federal Circuit to that contained in the statutory text. This section makes it perfectly clear that the new court is a court of limited jurisdiction.

H. R. Rep. 97-312, 97th Cong., 1st Sess., p. 39. Thus, as amended by the Federal Courts Act, 28 U.S.C. §1291 reads:

The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be *limited* to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title. [Emphasis added.]

The Federal Circuit was created after years of conflict, and was viewed with suspicion. An expanded view of its

jurisdiction is not warranted.<sup>9</sup> In light of the limited subject matter jurisdiction of the Federal Circuit, and the careful statutory withholding of Federal Circuit jurisdiction over tort cases by the except clause of §1295(a)(2), the court of appeals properly held it had jurisdiction of this appeal.

**B. The Government Previously Conceded the Regional Circuit Court Had Jurisdiction, and is Belatedly Raising Jurisdictional and Frivolity Arguments.**

Even though plaintiffs' Federal Tort claims were dismissed on procedural grounds, it is well established that appellate jurisdiction is determined at the outset of a case by the nature of the claims asserted. Such jurisdiction is not ousted by dismissal in the district court, or by subsequent treatment of the claims. *Bray v. United States*, 785 F.2d 989 (Fed. Cir. 1986); *Atari, Inc. v. JS & A Group, Inc.*, 747 F.2d 1422, 1431 (Fed. Cir. 1984). This rule provides logic and predictability to the appellate process, and eliminates uncertainty, delay, and forum-shopping. *Id.*, at 1432.

The court below expressly found that plaintiffs' Federal Tort claims were not frivolous or presented for improper motives, and must therefore be considered in determining appellate jurisdiction, JA 33, n. 27. The district court also treated plaintiffs' Federal Tort claims as non-frivolous, JA

<sup>9</sup> "[I]t bears repetition here that the Federal courts are courts of limited jurisdiction. There is never a presumption in favor of jurisdiction, and the basis for that jurisdiction always must be affirmatively shown. It is not sufficient that jurisdiction merely be inferred argumentatively. See, e.g., *Hanford v. Davies*, 163 U.S. 273 (1896); *Thomas v. Board of Trustees of Ohio State Univ.*, 195 U.S. 207 (1904) . . . An analysis of pertinent cases reveals that both the Court of Claims and the Court of Customs and Patent Appeals have followed these dictates. Both courts have strictly construed their own jurisdiction. They have not allowed inferential and unwarranted increases to their own respective jurisdictions." S. Rep. 97-275, 97th Cong., 1st Sess., p. 40 (1981).

151-154, and responded in detail to plaintiffs' equitable arguments, the futility problem, and the class filing issue. The district court even invoked the statute of limitations analysis which is now before this Court for review, JA 153. While the courts below have thus far rejected plaintiffs' efforts to apply equitable waiver, futility, or exhaustion doctrine to their Federal Tort claims, plaintiffs are fully within their rights to seek—as they do even here—a modification of existing law in this extraordinary case of governmental misconduct. *Bell v. Hood*, 327 U.S. 678 (1946).

Furthermore, the government repeatedly conceded the jurisdictional argument in favor of plaintiffs, and now appears to be forum-shopping. Frivolity is an afterthought. The government raised the jurisdictional issue in the court of appeals, but then acknowledged in its briefs and oral argument that the District of Columbia Circuit was the proper appellate forum. The government first argued that plaintiffs' Tucker Act claims were barred, and therefore plaintiffs had no Tucker Act claims to provide §1295(a)(2) Federal Circuit jurisdiction. The court of appeals quickly identified the government's contorted argument as a procedural gambit to seek an alternate appellate forum in the event the D.C. Circuit's ruling was unfavorable to the government.<sup>10</sup>

<sup>10</sup> During oral argument the following interchange occurred:

GOVERNMENT COUNSEL: I must say that I have addressed the issue of this Court's jurisdiction, despite the fact that it is perhaps the only point on which we agree with the appellants—

COURT: For a different reason?

GOVERNMENT COUNSEL: Yes, for different reasons.

COURT: You win only if they lose?

GOVERNMENT COUNSEL: That is an excellent way of stating our conclusion, because we think that they must lose since the District Court's jurisdiction was not based on the—

COURT: If they win on the merits, they lose on jurisdiction; if they



In its petition for rehearing *en banc*, the government continued to concede the District of Columbia Circuit had jurisdiction, but adopted a different rationale. The argument was that the 1948 Claims Act, 50 U.S.C. App. §1981, *et seq.*, provided exclusive jurisdiction over any claims by plaintiffs, and thus plaintiffs still had no valid Tucker Act claims subject to Federal Circuit jurisdiction under §1295(a)(2). This position was contrary to both the district court and the court of appeals decisions, which noted the severe limitations of the Japanese-American Claims Act and the grave constitutional questions which would arise if that Act were construed to prohibit Takings claims.

An appeal *de novo* now in the Federal Circuit should be avoided.<sup>11</sup> Furthermore, even if this Court should hold that §1295(a)(2) gave the Federal Circuit appellate jurisdiction in this case, the Court should proceed to the merits of the statute of limitations issue, and affirm the court of appeals on that question. There has already been some unfortunate judicial jockeying about what is or is not the "law of the case." JA 35, n. 31, and JA 73. A reversal on only the jurisdictional question without guidance on the limitations issue will only engender delay and uncertainty.

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lose on the merits, they win on jurisdiction, is that it?

GOVERNMENT COUNSEL: Your Honor has critically stated our view as applied to the dilemma of plaintiffs' own making.

Transcript of oral argument before the court of appeals, September 24, 1985, p. 24.

<sup>11</sup> In *Squillacote v. United States*, 747 F.2d 432 (7th Cir.), *cert. denied*, 471 U.S. 1016 (1985), similar government attempts at retrospective forum-shopping were rebuked by the Seventh circuit, which held that in the name of judicial efficiency and fairness the regional court of appeals had jurisdiction, even though §1295(a) would require future appeals to go to the Federal Circuit.

## II. THE COURT OF APPEALS PROPERLY RULED THAT PLAINTIFFS' TAKINGS CLAIMS WERE TIMELY FILED.

With a remarkable lack of candor, the government maintains it did not mislead this Court in the wartime cases. The government fails even to acknowledge that every district court which has recently reviewed the true facts has found the government misled this court.<sup>12</sup> Forty years after the fact, plaintiffs discovered not only that the government was wrong as to "military necessity," but also that the government knowingly had gone to extraordinary lengths to keep this Court from learning the truth. This is not a speculation by plaintiffs. It is the finding of the Commission, and of every district court. In light of these findings, it requires more charity than plaintiffs can muster to accept the government's contention, Brief for the United States, at 31-37, that it did not mislead this Court.

First the government argues that in the wartime cases it based its entire argument to this Court on racist inferences rather than facts. The government therefore says it is hardly to blame if this Court adopted those inferences, Brief for the United States, at 31-37. The argument is incredible. Can the government rationally contend that it invited this Court to approve the incarceration of 120,000 people *en masse* (or that this Court would so act) merely on the basis of "ancestral, cultural, and ethnic considerations," Brief for the United States, at 31? To the contrary, as the court below found, JA 19, 24, this Court deferred to the factual judgments of the military.

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<sup>12</sup> *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1985), *rev'd on other grounds*, 782 F.2d 227 (D.C. Cir. 1986); *Korematsu v. United States*, 584 F.Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 627 F.Supp. 1445 (W.D.Wash. 1986), *appeals pending*, 9th Cir. Nos. 86-3853 and 86-3887; *cf.*, *Yasui v. United States*, Civ.-83-151-BE (Order of January 26, 1984, D.Or.), *appeals pending*, 9th Cir. Nos. 84-3730 and 86-3116.

Second, the government asserts that the fraud as to a lack of "military necessity" was known long ago. The argument founders because unavailing claims for compensation were brought by thousands of Americans of Japanese ancestry in the 1940's, 1950's, and continuing even into the 1960's. The *coram nobis* courts, *supra*, n. 12, as well as the court below have all held that it was only in the 1980's that plaintiffs had a sufficient basis to rebut the government's continuing claim of "military necessity," and to overcome the deference to that claim created by this Court's three wartime decisions. Now that the fraud has been discovered, the government simply says the facts were obvious, and should have been sued on long ago.

**A. The Statute of Limitations was Told for Plaintiffs' Taking Clause Claims.**

**1. The Government Misled this Court Regarding Military Necessity.**

The district court held in this case:

"It is undisputed that reports from the FCC, the FBI, and Naval Intelligence contradicting the claim of military necessity were concealed by defendant throughout the war, as most graphically illustrated by the Ennis and Burling memoranda [JA 264-276] urging the disclosure of these findings in the *Hirabayashi* and *Korematsu* briefs." [JA 140, emphasis added.]

The concealment, however, was far broader than the short quotation above can indicate.

**a. The *Final Report* —deliberate falsehoods.**

The factual basis for the War Department's claim of military necessity was presented in an official apology, entitled *Final Report, Japanese Evacuation from the West Coast, 1942* (1943). During oral argument before this Court in *Korematsu*, the government relied on the *Final Report*

and urged each Justice to read it, without any disclaimer as to the "facts" presented therein, *see, infra*, p. 26.

The *Final Report* had two major factual premises regarding military necessity. First, it alleged that persons of Japanese ancestry were engaged in subversive acts and plans for espionage and sabotage against the United States. In support, the *Final Report* cited numerous purported acts of espionage, including supposedly illicit radio use and signalling. No such activity was ever proved; all evidence was to the contrary. The second premise of the *Final Report* was that there was insufficient time to separate the "loyal" from the allegedly "disloyal" Japanese Americans. In fact, individual loyalty was viewed as irrelevant. The decision for *en masse* detention was based on banal and prosaic considerations of administrative and political convenience. *Personal Justice Denied*, pp. 9-10. *See, infra*, pp. 24 and 29. (Gen. DeWitt advised that individual evacuation was practical).

**b. Concealment of authoritative intelligence reports refuting military necessity.**

A recently discovered Department of Justice memorandum, JA 272-76, shows that the government knew, prior to the briefs and oral argument in *Korematsu*, that the government's claim of military necessity was contrary to the facts, was unsubstantiated by the responsible intelligence agencies, and was known by the military to be false.<sup>13</sup> Government documents discovered at the same

<sup>13</sup> The War Department was not designated to gather intelligence information concerning the Japanese American community, because the experience of the ONI and FBI was superior in that area. Even so, the Army's own Military Intelligence Division reported that there were no wartime fifth column activities, contradicting the military commander's allegations of fifth column activities by Japanese Americans at the onset of the mass exclusion program. *See Yamamoto, Korematsu Revisited-Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review*, 26 Santa Clara L.Rev. 1, 15 (1986).



time, JA 264-69, show that prior to filing its *Hirabayashi* brief, the Justice Department had knowledge of the Ringle Report (JA 226-37), and was informed it represented the views of the ONI. The Solicitor General was urged to disclose the report rather than suppress the evidence before this Court, JA 268, and was warned of the falsity of the government's claim of military necessity, *ibid.*:

...in one of the crucial points of the case, the Government is forced to argue that individual, selective evacuation would have been impractical and insufficient *when we have positive knowledge that the only Intelligence agency responsible for advising Gen. DeWitt gave him advice directly to the contrary.* [Emphasis added.]

Yet the government failed to notify this Court of the existence of the Ringle Report, or of other facts known to ONI and the War Department.

The FBI also had notified the Justice Department that it opposed the mass racial actions as unnecessary, and that such actions which were based primarily upon public and political pressure rather than on facts. *Personal Justice Denied*, pp. 72-73. Early in the war the FBI had arrested and held individual hearings on those specific aliens suspected of potential disloyalty, *id.*, p. 55. The FBI had good reason to be confident of its control of the situation, due to a secret (and recently disclosed) pre-war burglary of the Japanese consulate in Los Angeles, JA 181. See Irons, *Justice at War*, at 22.

Even while the Justice Department was preparing its brief in *Korematsu*, the F.C.C. directly refuted the military commander's claims of illicit signalling and radio use by Japanese Americans. On April 4, 1944, F.C.C. Chairman Fly informed the Justice Department that *every* charge of illicit radio use and signalling by Americans of Japanese ancestry had been promptly investigated by the F.C.C. and found to be groundless, JA 240-41. Another recently un-

covered Department of Justice memorandum shows that the FBI had reached the same conclusion, and that General DeWitt knew the allegations of illicit radio signals were false. JA 270-71.

The suppression of evidence reached perhaps its crassest point in a pretermitted attempt to alert this Court to the known inaccuracies in the *Final Report* by Department of Justice attorneys, who inserted a proposed footnote in the government's *Korematsu* brief stating:

The [Final Report's] recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signalling by persons of Japanese ancestry, in conflict with information in possession of the Department of Justice. In view of the contrariety of the reports on this matter, we do not ask the Court to take judicial notice of the recitals of those facts contained in the Report.

Memorandum from John L. Burling to Assistant Attorney General Herbert Wechsler, September 11, 1944, quoted in *Korematsu v. United States*, 548 F.Supp. 1406, 1417 (N.D. Cal. 1984). Military officials, alerted to the footnote, physically intervened while the briefs were at the printer, and caused the footnote to be rewritten.<sup>14</sup>

<sup>14</sup> For a full account of these dramatic events, see Irons, *Justice at War: The Story of the Japanese American Internment Cases*. Oxford University Press (New York, 1983) Chapter 11, "The Printing Stopped About Noon," pp. 278-310. The revised footnote deleted all mention of "contrariety" of facts, and stated, "We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice; and we rely upon the *Final Report* only to the extent that it relates to such facts." Brief for the United States, at 21-22, *Korematsu v. United States*, 323 U.S. 214 (1944). The government, in a remarkable example of "double-speak,"

The government is still dissembling. The government now says footnote 2 in its *Korematsu* brief was clear to this Court as an "explicit dis-incorporation" of the *Final Report*, but the Solicitor General actually stated the opposite at oral argument:

It is even suggested that because of some footnote [sic] in our brief in this case indicating that we do not ask the Court to take judicial notice of the truth of every recitation or instance in the final report of General DeWitt, that the Government has repudiated the military necessity of the evacuation. It seems to me, if the Court please, that that is a neat little piece of fancy dancing. There is nothing in the brief of the Government which is any different in this respect from the position it has always maintained since the *Hirabayashi* case—that not only the military judgment of the general, but the judgment of the Government of the United States, has always been in justification of the measures taken; and no person in any responsible position has ever taken a contrary position, and the Government does not do so now. Nothing in its brief can validly be used to the contrary.

Transcript of Oral Argument of the Solicitor General in *Korematsu v. United States*, October 12, 1944, p. 7.

Further, the Solicitor General recited portions of the *Final Report's* justifications for the government's actions, and referred the Court to the body of that document for the operative military considerations. *Id.*, pp. 12-13. See

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now refers to the revised footnote as an "explicit dis-incorporation" of the "more colorful allegations of the *Final Report*." Brief for the United States, at 33. The Solicitor General at the time, however, took a much more supportive approach to the *Final Report* during oral argument in *Korematsu*, see, *infra*, pp. 26-28.

also, *Irons, Justice at War*, p. 317. Defending the *Final Report in toto*, the Solicitor General stated:

...there is not a single line, a single word, or a single syllable in that report which in any way justifies the statement that General DeWitt did not believe he had, and did not have, a sufficient basis, in honesty and in good faith, to believe that the measures which he took were required as a military necessity in protection of the West Coast.

*Id.*, pp. 6-7. Chief Justice Stone specifically asked whether the *Final Report* reflected "all that was known, or could be known, by the military authorities in forming this judgment." The Solicitor in response failed to disclose the authoritative contrary intelligence reports, and continued to invite the Court's judicial notice of the alleged facts underlying the military commander's actions, Transcript, p. 10, an answer which was in itself a neat little piece of fancy dancing.

In retrospect, Mr. Justice Frankfurter hit the nail most squarely on the head, while the Solicitor continued to stand solidly behind the *Final Report* (Transcript, pp. 10-11):

MR. JUSTICE FRANKFURTER: Suppose the commanding general, when he issued Order No. 34, had said, in effect, "It is my judgment that, as a matter of security, there is no danger from the Japanese operations; but under cover of war, I had authority to take advantage of my hostility and clear the Japanese from this area." Suppose he had said that, with that kind of crude candor. It would not have been within his authority, would it.

THE SOLICITOR: It would not have been.

MR. JUSTICE FRANKFURTER: As I understand the suggestion, it is that, as a matter of



law, the report of General DeWitt two years later proved that that was exactly what the situation was. As I understand, that is the legal significance of the argument.

THE SOLICITOR: That is correct, Your Honor; and the report simply does nothing of the kind.

What the Solicitor General failed to disclose was that exactly the kind of *Final Report* Mr. Justice Frankfurter envisioned had indeed been authored by General DeWitt, but all copies of it had already been ordered burned, so as not to disclose the true motives which were operating. These facts, too, were not learned until very recently, *see, infra*, pp. 28-30.

The recently-discovered internal memoranda of the Department of Justice were the first "specific evidence of governmental misconduct available," *Korematsu v. United States*, 584 F. Supp. 1406, 1419 (N.D. Cal. 1984). Indeed, it was fortuitous that these crucial documents were ever found.<sup>15</sup>

**c. The alteration and burning of the "first" *Final Report*.**

In an equally important discovery in the early 1980's, the Commission unearthed a previously unknown version of the *Final Report*, referred to here as the First Edition. *See, Personal Justice Denied*, pp. 222-23, and n. 32 to p. 223. The First Edition was distributed to key governmen-

<sup>15</sup> The files were originally in the Department of Justice, but were never taken to the national archives or any other accessible depositories, and were misfiled in the Alien Enemy Control Board Hearing records of the Immigration and Naturalization Service. The files were located only due to the dogged persistence and expertise of Prof. Peter Irons, a historian who pursued numerous Freedom of Information Act requests, and finally sought the assistance of the Commission on Wartime Relocation and Internment of Civilians in obtaining copies of the documents. He is the first member of the public ever known to have viewed these crucial, non-published documents. *See, Affidavit of Prof. Irons*, JA 300-08.

tal officials in final form in April, 1943. It carried General DeWitt's statement regarding the racial reasons for the relocation, including the comment:

It was not that there was insufficient time in which to make such a determination [of loyalty]; it was simply a matter of facing the realities that a positive determination could not be made, that an exact separation of the "sheep from the goats" was unfeasible.

*See Yamamoto, supra*, at 10.

The statement was a dagger in the heart of the War Department's plan to tell this Court that mass racial imprisonment was necessary because of *insufficient time* to make individual loyalty determinations. After vigorous efforts by Assistant Secretary of War McCloy, General DeWitt revised the First Edition to obscure blatantly racist remarks, and altered the above-cited statement to read, "To complicate the situation, no ready means existed for determining the loyal and disloyal with any degree of safety." *Final Report*, at 9. *See, Yamamoto, supra*, at 11, Irons, *supra*, at 206-11. After the alterations were completed, General DeWitt ordered all copies of the First Edition recalled, and all galley proofs, galley pages, drafts, memoranda, and cover letters burned. Inexplicably, one copy of the First Edition survived, along with related memoranda as to requested changes, orders, and affidavits as to the burning, all of which were found by the Commission. *See, Affidavit of Aiko Herzig-Yoshinaga*, JA 344; *Personal Justice Denied*, p. 223, n. 32.

The alteration of the First Edition succeeded. This Court credited the claim that there was *insufficient time* for individual loyalty determinations, *Hirabayashi*, 320 U.S. at 99; *Korematsu*, 323 U.S. at 218, without knowing that claim was contradicted by General DeWitt himself. Yet

...the failure of the government to disclose to petitioner, to petitioner's counsel, and to the Supreme Court the reason stated by General DeWitt for his deciding that military necessity required the exclusion of all those of Japanese ancestry from the West Coast was an error of the most fundamental character and...petitioner was in fact seriously prejudiced by that non-disclosure in his appeal from his conviction....

*Hirabayashi v. United States*, 627 F. Supp. 1445, 1457 (W.D. Wash. 1986), *appeals pending*, 9th Cir., Nos. 86-3853 and 86-3887.

**d. Pre-war plans for concentration camps.**

One of the more depressing aspects of recent disclosures is the additional discovery that plaintiffs' imprisonment for racial reasons was planned long before Pearl Harbor. In the 1980's internal governmental memoranda were discovered which disclosed planning for the use of "concentration camps" to imprison Americans of Japanese ancestry "in the event of trouble," and "to impress the Japanese with the seriousness of our preparations [for war.]" See, Memorandum of October 9, 1940, to the President, from Secretary of the Navy Knox (JA 219-20), and Memorandum from the President to the Chief of Naval Operations, dated August 10, 1936 (JA 220). These pre-war plans, never previously disclosed, demonstrate again that the government *knew* there was no military emergency requiring the incarceration of plaintiffs. The closer one looks, the more clearly one sees that the government knew it was hiding the racial reasons for plaintiffs imprisonment, and went to unprecedented lengths to conceal that knowledge from this Court.

**2. This Court's Wartime Decisions Effectively Precluded Plaintiffs' Takings Clause Claims.**

**a. Takings claims and military necessity doctrine.**

The Fifth Amendment requires compensation for governmental takings of private property for public use. *United States v. Causby*, 328 U.S. 256, 257 (1946); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932). The courts below found that plaintiffs asserted valid Takings claims, because the government's wartime actions caused the loss, destruction, or seizure of virtually all of plaintiffs' property. JA 38-39; 131-33. See, *Economic Losses of Ethnic Japanese as a Result of the Exclusion and Detentions, 1942-1946*, Papers for the Commission on Wartime Relocation and Internment of Civilians, Part III (June 1983), estimating uncompensated economic losses at \$3.4 to \$4.2 billion. In order to pursue their Takings claims, however, plaintiffs had to show that their losses were not the product of actions based on "military necessity."

Property losses caused by military necessity have long been held excluded from the Fifth Amendment's mandate of compensation for governmental taking of private property. In *United States v. Pacific Railroad Co.*, 120 U.S. 227, 234 (1887), this Court held: "The injury and destruction of private property caused by [military] operations, and by measures necessary for their safety and efficiency," are noncompensable because the "safety of the State in such cases overrides all considerations of public loss." Thus, so long as the loss of property is "caused by actual and necessary military operations," it does not create an actionable wrong against the government; if a government makes compensation under such circumstances, it is "a matter of bounty rather than of strict legal right." *Id.*, at 239. This doctrine was reaffirmed in *United States v. Caltex Inc.*, 344 U.S. 149 (1952) (destruction of petroleum terminals), and *Juragua Iron Co. v. United States*, 212



U.S. 297 (1909) (destruction of a factory housing contagious germs).

Indeed, the government in this case still asserts that plaintiffs' claims are barred by military necessity:

Governmental action pursuant to a perceived need to protect the national security does not in and of itself create a taking claim, regardless of the basis, or lack of basis for the government's decision. *YMCA v. United States*, 395 U.S. 85 (1969); *Monarch Insurance v. District of Columbia*, 353 F. Supp. 1249 (D.D.C. 1973), *aff'd*, 497 F.2d 684 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1021.

Memorandum in Support of Defendant's Motion to Dismiss, p. 23. The district court understood that was the government's position, JA 132-33, and also understood the government's concealment went to the essence of this issue, JA 140. *Hirabayashi* and *Korematsu* authorized plaintiffs' sudden and mass imprisonment as an emergency exercise of the war-making power for the protection and security of the United States. *A fortiori*, those cases authorized the taking of plaintiffs' property, as the Attorney General held in *Claim of Sogawa*, *infra*, p. 35.

In direct reversal of its district court (and wartime) positions, the government now argues that military necessity was not a defense to plaintiffs' Takings Clause claims because the losses were not a necessary or even a consequential result of the wartime actions. Brief for the United States, at 39. The government is wrong on the facts and the law.

First, as a factual matter, plaintiffs' property losses were directly caused by the government's wartime actions. Whether the losses were deliberate or not, those losses were incident to and caused by government action under supposed emergency conditions carried out as a military

operation for stated military purposes. The scope of the military necessity doctrine extends to "losses" sustained in the necessary operations of war, including those "occasioned, not wilfully, but through necessity and by mere accident, in the exertion of [sovereign] rights." *United States v. Pacific Railroad Co.*, *supra*, at 235.

Further, if as the government claimed in the wartime cases (and this Court agreed) there was insufficient time to conduct individual loyalty determinations, there was certainly insufficient time to arrange for any meaningful protection of the extensive property interests held by plaintiffs. The mass exclusion orders, for example, were carried out on as short as 48 hours' notice, JA 188. Plaintiffs were under orders to take no more than what they could carry in their own hands. JA 66. Entire communities disappeared overnight, with no one left to manage homes, businesses, or farms. *See, generally, Personal Justice Denied*, pp. 117-122. The government refers to its wartime promises to protect plaintiffs' property, Brief for the United States, at 40, but concedes those protections were "inadequate." In short, as the district court found, JA 133, takings under the Fifth Amendment were properly alleged.

Second, as a legal matter, the government's wartime actions were squarely within the "military necessity" doctrine. The events had every appearance of a battlefield emergency, by deliberate design of the government. The West Coast states had been designated as a "theater of combat operations,"—the Western Defense Command. Executive Order 9066 authorized the military commander to take "every possible protection against espionage and against sabotage," JA 259. Pursuant to that order, military forces rounded up plaintiffs *en masse* at gunpoint, as "potential saboteurs, espionage agents, or fifth columnists," JA 255. Properties were seized either to prevent their supposed use for espionage (cameras, radios, etc.), or to assist the Allied war effort (crops, businesses, cars).

General DeWitt stated, military necessity "required. . . that the Japanese population be removed. . . where the danger of action in concert during any attempted enemy raids along the coast, or in advance thereof. . . would be eliminated." *Final Report*, p. 43. Military operations of this nature were within the sovereign's power announced in *United States v. Pacific Railroad Co.*, *supra*, at 235:

...[w]hatever would embarrass or impede the advance of the enemy. . . or would cripple or defeat him. . . [was] lawfully ordered by the commanding general.

Accordingly, as the court of appeals held, JA 53, 55, plaintiffs' Takings claims were not viable until they could overcome the military necessity defense. *See also, Ware v. United States*, 626 F.2d 1278 (5th Cir. 1980).

**b. Earlier efforts to challenge military necessity were rejected on the basis of the wartime cases.**

In *Korematsu*, *Hirabayashi*, and *Yasui*, this Court accepted the government's claim of "military necessity."<sup>16</sup> It was the key factual issue in the wartime cases. Petitioners and *amici curiae* (the American Civil Liberties Union and the Japanese American Citizens League), vigorously argued that the government's actions were based on bad faith and blatant racism, that they were not based on any true analysis of military factors, that the alleged military justifications of the government in the *Final Report* were falsehoods, misrepresentations, or absurdities, and that the federal agencies responsible for intelligence saw no need for and opposed the military's insistence on mass exile and

<sup>16</sup> In *Ex Parte Endo*, 323 U.S. 283 (1944), the Court refused to reach the constitutional challenges to the mass detention orders raised by Ms. Endo, but in *dictum* continued to adhere to its earlier findings of military necessity underlying the government's wartime program. *Id.* at 298, 302.

imprisonment.<sup>17</sup> Their briefs even cited the 1942 *Harper's Magazine* article by an "anonymous" military officer (excerpts of the Ringle Report).<sup>18</sup> Rejecting these arguments *in toto*, this Court held that military necessity justified the mass deprivations of plaintiffs' rights. In so doing, this Court sanctioned the losses of property incident to the curfew, evacuation, and contraband orders which were part and parcel of the government actions then under review.

According to the Commission, over 26,000 claims for monetary losses totaling \$148 million were filed under the 1948 Claims Act, but only approximately \$37 million was distributed. *Personal Justice Denied*, p. 118. The Attorney General, as Administrator of the 1948 Claims Act, held in the leading case, *Claim of Sogawa* (1950), *Attorney General Precedent Decisions*, *supra*, n.6, p. 126, that the wartime actions did not give rise to any "actionable wrong," because property losses not specifically authorized by the 1948 Claims Act "may not be adjudicated as if the claimant's evacuation constituted a legal wrong, in the teeth of the Supreme Court decision in the *Korematsu* case, *supra*, to the contrary." *Id.* at 134, cited at JA 30-31.

The *Sogawa* rationale was repeatedly followed and cited by the Attorney General during the administration of the

<sup>17</sup> Brief of JACL in *Korematsu v. United States*, pp. 56, 69, 71, 80-81, 117-118; Brief of Northern California ACLU in *Hirabayashi v. United States*, pp. 54-55; Brief of ACLU in *Korematsu v. United States*, pp. 18, 20-23, (at 22-23):

... If the Office of Naval Intelligence and the Director of the Federal Bureau of Investigation recommended complete evacuation, undoubtedly that would have been mentioned in the DeWitt Report. . . . Since no recommendations from either the ONI or the FBI are referred to, one can only assume either that they were not sought or that they were opposed to mass evacuation. In either case, the inference becomes overwhelmingly strong that what was involved was not military security but race prejudice and hysteria.

<sup>18</sup> Brief of JACL in *Korematsu v. United States*, pp. 107-108; Brief of ACLU in *Korematsu v. United States*, p. 23.



1948 Claims Act.<sup>19</sup> Congress had the opportunity to reverse these cases in 1951 and 1956 when it considered amendments to the 1948 Claims Act, but did not do so, thereby confirming Congress' belief that military necessity absolved the government from any Takings liability, JA 31.

Moreover, under the 1956 amendments to the 1948 Claims Act, claimants were permitted a judicial determination by the U.S. Court of Claims, 50 U.S.C. App. §1984(b) (1956 amendment). The Court of Claims, however, was already of the view that the military necessity rationale of *Korematsu* and *Hirabayashi* barred any takings claims. *Aleutian Livestock Co., Inc. v. U.S.*, 96 F.Supp. 626, 628 n.2 (Ct. Cl. 1951), *cert. denied*, 342 U.S. 875 (1951), *reh. denied*, 342 U.S. 907 (1952) (holding sovereign immune from economic losses occasioned by evacuation of Aleutian Islanders after Pearl Harbor, and expressly citing the wartime cases); *accord*, *Franco-Italian Packing Co. v. U.S.*, 128 F.Supp. 408 (Ct. Cl. 1955) (war powers immunized government from liability for arrest and detention of tuna boats suspected of signalling Imperial Japanese forces after Pearl Harbor).

<sup>19</sup> Claims denied which would have been compensable takings but for the purported military necessity rationale include the following decisions cited in the *Attorney General Precedent Decisions*: interest from the date of taking, *Claim of Kawaguchi*, p. 14; losses from summary confiscations of personal property, *Claim of Noda*, p. 84; *Claim of Nakamura*, p. 108; losses by lawful permanent residents pursuant to "alien enemy" regulations, *Claim of Nakagawa*, p. 216; lost rent earnings, and profits directly attributable to property interests, *Claim of Usui*, p. 112; *Claim of Itow*, p. 51; damages to rights to use and enjoyment of property, *Claim of Yamamoto*, p. 205; *Claim of Down*, p. 308; losses of vested public benefits, employment contracts, and educational programs, *Claim of Matsuhira*, p. 146; *Claim of Sakurai*, p. 346; *Claim of Iwamoto*, p. 369; and expenses incurred in preparation for exile or settlement after imprisonment, *Claim of Nakata*, p. 168; *Claim of Morimoto*, p. 219; *Claim of Yoshida*, p. 286.

The clutch of cases now cited by the government, Brief for the United States, at 47-49, does nothing to detract from the overwhelming support the federal courts gave to the actions of the government and to this Court's wartime cases, *supra*, n. 4.<sup>20</sup> There was no weakening whatsoever of the three separate holdings of this Court in *Hirabayashi*, *Korematsu*, and *Yasui* that plaintiffs' evacuation and incarceration were invoked and executed under an approved military necessity.

<sup>20</sup> *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), involved a declaration of martial law by the governor of Hawaii. Duncan, a non-Japanese, was arrested in 1944 for brawling with two Marine sentries. White, a co-petitioner (also non-Japanese), was arrested in 1942 for embezzlement. Both were tried before military courts. This Court held that Hawaii's Organic Act did not justify the governor's supplanting of civilian tribunals. (The Solicitor, Brief for the United States, at 47, is to be commended for having found the words "military necessity" in footnote 1 of Mr. Justice Burton's dissenting opinion, 327 U.S. at 339). The majority opinion, however, expressly stated it was not considering cases such as those relating to "military functions" or "curfew rules," 327 U.S. at 314. *Honda v. Clark*, 386 U.S. 484 (1967), involved no exercise of military authority, but rather the confiscation and return of assets in depositors' bank accounts, whose claims were specifically authorized by Congress in a 1946 amendment to the Trading with the Enemy Act. *Oyama v. California*, 332 U.S. 633 (1948), also involved no exercise of military power, but rather California's escheat of land held in violation of its Alien Land Law. This Court ruled on equal protection grounds. In *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), this Court also voided on equal protection grounds a 1945 California statute which barred persons ineligible for citizenship from holding commercial fishing licenses. *Guessefeldt v. McGrath*, 342 U.S. 308 (1952), again involved statutorily-authorized claims under the Trading With the Enemy Act. (Guessefeldt, who had lived in U.S. territory from 1896 to 1938, was marooned in Germany while on vacation, and forced to stay until 1949, when he returned to the United States. This Court ruled that this did not make him an ineligible "resident" in enemy territory.) The facts and law were similar in *Nagano v. McGrath*, 187 F.2d 759 (7th Cir. 1951) (mother marooned in Japan during the war while trying to help her daughter find a husband).

**B. The Statute of Limitations was Tolloed Until the 1980's Due to Government Fraud and Concealment.**

**1. The Court of Appeals Properly Ruled that the Statute of Limitations was Tolloed Until Deference to the Military was Legally Removed.**

Statutes of limitations are tolled where the defendant's fraud conceals the plaintiff's cause of action. *Bailey v. Glover*, 88 U.S. 342, 348 (1875); *Exploration Co. v. United States*, 247 U.S. 435 (1918). This equitable rule is read into every statute of limitations, *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946), including the six-year statute of limitations, 28 U.S.C. §2401(a), governing plaintiffs' Takings claims.

The statute begins to run only when a plaintiff, in the exercise of due diligence, knew or reasonably should have known of the necessary elements of the cause of action. Where, as here, fraudulent conduct on the part of the defendant interferes with plaintiff's efforts to know, learn of, and pursue a claim based on fraud, a suit alleging such fraud and concealment should not be dismissed except in the rare instance where plaintiff "has inexcusably slept on his rights" so as to make a decree against the defendant unfair, or where plaintiff's "lack of diligence is wholly unexcused." *Holmberg v. Armbrecht*, *supra*, at 396.

The court of appeals properly ruled that plaintiffs could not reasonably be expected to know they had a cause of action to bring until the legal significance of this Court's wartime rulings were undermined. The government's fraud had procured legal decisions from the highest court in this land, holding that the actions taken against plaintiffs were compelled by military necessity. Those holdings constituted a bar to plaintiffs' Takings claims. Until the legal bar was undermined or until plaintiffs reasonably should have known sufficient facts establishing that a fraud on this Court had produced the wartime holdings, the statute of limitations did not begin to run.

**a. This Court's deference to the military.**

In *Hirabayashi* and *Korematsu* this Court deferred to the judgment of the Executive and Congress—the "war-making branches":

Whatever view we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with . . . .

*Hirabayashi*, 320 U.S. at 99. That deference was reiterated in *Korematsu*, where this Court refused again to look behind the military judgment that there was insufficient time to separate the loyal from the disloyal, 323 U.S. at 218-19.

The court of appeals properly held that the statute of limitations on plaintiffs' Takings claims was tolled until the deference to the judgment of the war-making<sup>branches</sup> was legally removed. JA 56, 104. The government misconstrues this holding as creating a rule of absolute deference to the military. It does no such thing. The holding of the court below merely recognizes the post-war refusal to re-examine the military necessity issue—a fact clearly borne out by the post-war cases and 1948 Claims Act challenges previously described. Where a plaintiff has no reasonable chance of surviving beyond the pleading stage, the cause of action does not accrue until plaintiff has the legal right to enforce the cause of action. See, *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1358 (5th Cir. 1972), and cases cited there (tolling the statute of limitations until a new ruling by this Court acknowl-



edged the compensability of government takings previously thought to be non-actionable).

The government further misconstrues the holding of the court of appeals as assertedly creating a new general rule which requires a "confession of error" to start the running of the statute. To the contrary, the decision only required removal of the "presumption of deference" toward the military necessity determination in this case by an "authoritative statement by one of the political branches that there was reason to doubt the basis of the military necessity rationale." JA 59. That, and nothing more, was the holding of the court below. *See*, JA 104:

We ruled narrowly, specifically, and only that when the Supreme Court has definitively held that deference to a military judgment is due in a particular case, litigants may not reasonably be required to re-litigate that issue in advance of a green light from the "war-making branches."

**b. The continuing presumption of "military necessity" in President Ford's repeal of E.O. 9066.**

The government argues, Brief for the United States, at 49, that an authoritative statement overcoming this Court's deference to the claim of military necessity in any event was provided (and the statute of limitations began to run) when President Ford repealed E.O. 9066 in 1976. Presidential Proclamation 4417, 3 C.F.R. 1976, Comp. pp. 8-9 (February 19, 1976). Yet that Proclamation embodied a continuing validation of the government's military necessity rationale: "The Executive Order [9066] was for the sole purpose of prosecuting the war with the Axis Powers . . . ." Further, the Proclamation only recognized a "mistake," *i.e.*, a measure honestly thought to be necessary at the time, which, in hindsight, was not. *Black's Law Dictionary*, Fourth Ed., p. 1152, defines "mistake" as "some unintentional act, omission, or error resulting from ignorance, surprise, imposition, or misplaced confidence." Even

a "mistaken" judgment of military necessity, however, would render non-compensable plaintiffs' losses of property. *United States v. Pacific Railroad Co.*, *supra*, at 235. The legal effects of the military necessity holdings could not be overcome merely by an acknowledgement, in hindsight, of a supposedly honest error of judgment.

Neither can the government take any comfort, Brief for the United States, at 49, from the phrase in President Ford's Proclamation, "We now know what we should have known then. . . ." That is in fact a continuing denial of plaintiffs' point: the government *did* know then the true facts, which first came to light in the 1980's. Not only did the government then know that plaintiffs' incarceration was "wrong"; the government purposefully and systematically withheld that knowledge from this Court and from plaintiffs. President Ford's proclamation therefore cannot be determinative on any limitations issue, because it carefully failed to acknowledge that any *legal* wrong had been done, as the court below held, JA 60, n.67, and JA 104, n.2.

**c. The 1980 creation of the Commission.**

The court of appeals properly ruled that creation of the Commission in 1980 was the first authoritative statement by a war-making branch that deference was no longer due the military commander's claim of military necessity. The authorizing legislation, finding that "no sufficient inquiry" had ever been made into the true events surrounding the wartime actions, 50 U.S.C. App. §1981 note, §2(a)(3), was a direct attack on the credibility of the military necessity rationale.

Thus, Senator Jackson stated:

The action of the Supreme Court in upholding the order and the failure of the Congress to question the order or to subsequently conduct an adequate investigation of the facts and

circumstances surrounding the internment is seen as an abrogation of our democratic responsibilities.

126 Cong. Rec 12055-56 (daily ed. May 22, 1980). Senator Mathias added (*id.*, at 12056), "This legislation would lay the framework for steps to right the wrongs that were done. . . ." A stated purpose of the Commission, 50 U.S. App. §1981 note, §4(c), was to report findings and recommendations, and the Commission did so. As of 1980, the time for general review and remedies had clearly come, and the court below was surely justified in finding the creation of the Commission signified that deference to the determination of military necessity was no longer due, and that compensable Takings might have occurred.

## 2. The Court of Appeals' Result is Consistent With Standard Factual Analysis in Tolling Cases.

The court below stated, JA 56, that factual as well as legal analysis was relevant to the question of tolling:

For the government to have concealed the factual basis of appellants' claims it would not merely have had to conceal evidence suggesting the absence of a military emergency. In addition, *the concealed evidence would have had to be sufficient to rebut the presumption of deference to the military judgment articulated by the Supreme Court.* [Emphasis in original.]

The court, JA 57, considered the historical documents reviewed by the district court regarding plaintiffs' allegations of massive concealment, found that the Complaint had support in the historical record, and concluded that concealment sufficient to toll the statute of limitations had been alleged, JA 58.

The court of appeals parted company from the district court in assessing the legal significance of the historical documents. The court of appeals observed, JA 58, that

neither the suppression nor the disclosure of the Ringle, Fly, or Hoover memoranda would toll or start anew the running of the statute of limitations, because that would have not reversed the presumption of deference erected in *Korematsu*. Plaintiffs agree. It is precisely because concealed evidence sufficient to rebut the presumption of deference articulated by this Court first became available in the early 1980's that the Complaint was filed then. This factual analysis supports affirmance of the court below.

### a. Due diligence requirements in light of this Court's war-time decisions.

The statute of limitations begins to run only when "plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit." *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977); *Richards v. Mileski*, 662 F.2d 65, 71 (D.C. Cir. 1981). In the instant action, as in *Ware v. United States*, 626 F.2d 1278 (5th Cir. 1980), plaintiffs knew they had lost property due to the government's actions, but plaintiffs did not know they might have a valid Takings claim until discovery of the government's fraud in late 1981. *Accord, United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972).<sup>21</sup>

<sup>21</sup> *United States v. Kubrick*, 444 U.S. 111 (1979), is not to the contrary. *Kubrick* involved the statute of limitations only as applied to the discovery of medical malpractice under the Federal Tort Claims Act. The Court observed, 444 U.S. at 118, "it is undisputed in this case that in January 1969 *Kubrick* was aware of his injury and its probable cause." In a fraud case such as the present one, that does not hold true. Plaintiffs were only aware they had lost their property. Because of the government's actions, they were not aware that this constituted an injury of any compensable kind, nor were they aware that the cause of the injury was the government's systematic cover-up of the lack of support for the claim of military necessity. Indeed, this Court in *Kubrick* distinguished cases such as the instant suit, where "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." 444 U.S. at 122. The court below adopted this analysis, JA 52, n. 56.



Prior to filing suit, plaintiffs had to discover facts obviously different from those argued to this Court in the wartime cases. Even though plaintiffs believed the government's wartime actions were racist and wrong, that belief had been vigorously argued and repeatedly rejected. Plaintiffs' subjective beliefs, or even hopeful inferences, did not constitute proof of knowingly concealed evidence.

A person's suspicion [of illegal governmental conduct] . . . cannot conceivably constitute notice of possible constitutional violations, without creating the anomalous situation of requiring persons to file suit on a hunch, only to be dismissed for failure to state a claim. A court simply cannot "require that an aggrieved party have proceeded from the outset as if he were dealing with thieves." *Hudak v. Economic Research Analysts, Inc.*, 499 F.2d 996, 1002 (5th Cir. 1974).

*Hobson v. Wilson*, 737 F.2d 1, at 35, 39 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985). See, *Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981).

What was needed was proof that the government concealed the true facts from this Court: that time to separate the "loyal" from the "disloyal" was irrelevant; that racial animus was the only operative factor; that there was no evidence of disloyalty on which the government was relying; and that the government's concealment was knowing, rather than just a mistaken judgment on the issue of military necessity. The sparse post-war references to intelligence documents which merely pointed in a direction different from that approved by this Court were insufficient.

**b. The insufficiency of earlier references to intelligence information.**

The government urges, Brief for the United States, at 42, n. 36, that the statute of limitations began to run

when scattered references to existing intelligence documents were first made in the 1940's and 1950's, e.g., M. Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation*, 291-294 (1949); J. tenBroek, E. Barnhardt & F. Matson, *Prejudice, War and the Constitution*, 298-302 (1954). Yet, citations to the documents were grossly inadequate for even the most diligent researcher, see, Affidavit of Aiko Herzig-Yoshinaga, JA 339-46, and many of the pertinent documents remained classified (or otherwise not publicly available) until the 1980's, or had not even been published prior to the Complaint. See, Affidavits of Aiko Herzig-Yoshinaga, *supra*, and Peter Irons, JA 300-308.

Fundamentally, the references in these works did not disclose evidence justifying an argument substantially different from that which had been presented to this Court in the 1940's. Plaintiffs cannot reasonably have known from those references what role, if any, the documents played in the government's overall assessment of military factors. See *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 309 (3rd Cir. 1983); and *Smith v. Nixon*, 606 F.2d 1183, 1191 (D.C. Cir. 1979), cert. denied, 453 U.S. 912 (1981), reh. denied, 453 U.S. 928 (1981).<sup>22</sup> In order to frame a complaint, plaintiffs had the Herculean task of proving a negative—that there was no basis for the military commander's judgment—all without access to the necessary documents and information which were in the exclusive control of the government. Secondary sources, or even the intelligence documents themselves, without more, could not prove that negative.

The reasonableness of plaintiffs' efforts to discover the truth remains to be judged. It is a matter of proof that

<sup>22</sup> For example, the Commission reviewed the so-called "Magic" transcripts of de-coded Japanese diplomatic cables, Brief for the United States, at 36, n.30, but found they provided no support whatever for the mass detention of ethnic Japanese. See, *Addendum to Personal Justice Denied* (Papers for the Commission), Part I (June 1983).

in the 1940's and 1950's, the Japanese American Citizens' League sought to expand the 1948 Claims Act remedies to cover Takings Clause losses, and consulted expert constitutional scholars and attorneys regarding whether there was any actionable wrong for the wartime losses approved by this Court. They were consistently advised that there was no legal right of action against the United States, as the Attorney General proclaimed.<sup>23</sup> The facts first sprang to light in the early 1980's, after the Commission began its work (as Congress, perhaps, foresaw would happen).

**c. The Department of Justice memoranda—the first specific evidence of government fraud.**

In the *Korematsu coram nobis* proceeding, the court stated:

The government has also failed to rebut petitioner's showing of timeliness. It appears from the record that much of the evidence upon which the petitioner bases his motion was not discovered until recently. *In fact, until the discovery of the documents relating to the government's brief before the Supreme Court, there was no specific evidence of governmental misconduct available.*

*Korematsu v. United States*, 584 F.Supp. 1406, 1419 (N.D.Cal. 1984) (emphasis added). The government advances no persuasive reason why it should not be subject

<sup>23</sup> Plaintiffs are not chargeable with knowledge of all archival documents when they were declassified or available via the Freedom of Information Act, because until very recently plaintiffs were not on notice of facts which were obviously different from those raised in the wartime Supreme Court cases. *Richards v. Mileski*, *supra*, at 71. Opportunity to investigate is not the key; a plaintiff must first be cognizant of facts which would lead an ordinary person to investigate. *Smith v. Nixon*, *supra*, 606 F.2d 1183, 1191 (D.C. Cir. 1979); *Wachovia Bank and Trust Co. v. National Student Marketing Corp.*, 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

to collateral estoppel on that finding. *See also Hirabayashi v. United States*, 627 F.Supp. 1445 (W.D.Wash. 1986).

The Department of Justice records, JA 264-76, the lost "First Edition" of the *Final Report*, the records of its suppression, and the military's revision of the Justice Department's *Korematsu* brief as originally drafted, are critical on the timeliness issue here. Those records contain the first direct evidence of deliberate governmental misconduct sufficient to stand a chance of overcoming this Court's approval of the government's claim of military necessity. That evidence was not uncovered until late 1981, and not published until 1983. *See*, Affidavit of Peter Irons, JA 301-06.

It is a matter of judgment whether the purposes of a statute of limitations are contravened by this suit. *See, Honda v. Clark*, 386 U.S. 484 (1967). A fraudulent government has no legitimate expectation of repose. It has operated for forty years with knowledge of its illegal actions, and has continually and deliberately concealed its wrongs to avoid judicial accountability. The evidence pertaining to the government's actions has not been lost; there is more now than ever before. The government, having wrongfully intended to delay and foreclose plaintiffs' claims, cannot take advantage of its own success by relying on the statute of limitations. *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 234 (1959); *Bailey v. Glover*, 88 U.S. 342 (1875).

**3. Equitable Estoppel is an Independent Basis for the Court of Appeals' Decision.**

The court of appeals, relying on traditional tolling principles, did not reach a different basis for upholding the timeliness of plaintiffs' claims—equitable estoppel. That doctrine looks more to the wrongdoing of the defendant than the diligence of the plaintiff. Plaintiffs here have the basis for an estoppel against the government, *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 428 (1965);



*United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970):

1. The government knew material facts regarding plaintiffs' loyalty and the lack of military need for mass imprisonment.
2. The government intentionally misrepresented and concealed those facts from plaintiffs and this Court.
3. Plaintiffs reasonably relied on those misrepresentations by peacefully leaving their homes and entering the camps, and by foregoing continued legal challenges.
4. Plaintiffs' reliance on the government's misrepresentations caused great injury, as well as delay in filing suit.

As with tolling, estoppel may be invoked to preserve subject matter jurisdiction against the defense of limitations.<sup>24</sup>

This Court has held that equitable estoppel may apply against the government where its conduct has fallen below the "minimum standard of decency, honor, and reliability."<sup>25</sup> Such misconduct is shown in this case, and it warrants the application of estoppel, even though courts are

<sup>24</sup> *Honda v. Clark*, 386 U.S. 484 (1967); *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-34 (1959); *Exploration Co. v. United States*, 247 U.S. 435 (1918); *McCormick v. United States*, 680 F.2d 345, 350 (5th Cir. 1982); *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977), appeal after remand, sub nom. *Melong v. Micronesian Claims Comm'n.*, 643 F.2d 10 (D.C. Cir. 1980). See also, *Moser v. United States*, 341 U.S. 41 (1951); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982); *Meister Brothers v. Macy*, 674 F.2d 1174, 1177 (7th Cir. 1982); and *United States v. Ruby Co.*, 588 F.2d 597 (9th Cir. 1978).

<sup>25</sup> *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 61 (1984); *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981); *Immigration and Naturalization Service v. Hibi*, 414 U.S. 5, 8-9 (1973); *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961).

traditionally reluctant to take that step. If tolling is held inapplicable, equitable estoppel should be applied to redress the effects of deliberate government wrongdoing.

#### 4. The Government Raised Factual Issues Precluding Summary Dismissal.

The government's motion to dismiss challenged essential facts in the Amended Complaint. Even in its brief to this Court, the government represents as fact that the wartime actions were justified by military necessity, Brief for the United States, at 2-4, and p. 36, n. 30; that the government did not mislead this Court regarding the justification for its wartime actions, Brief for the United States, at 31-37; that the government did not previously make use of military necessity as a bar to plaintiffs' Takings claims, Brief for the United States, at 40; and that the essential facts for a viable legal challenge were well known to plaintiffs by 1950, Brief for the United States, at 43. Each of these crucial facts is contravened.

It would be incorrect to affirm dismissal of the Amended Complaint pursuant to a motion raising the statute of limitations as a jurisdictional bar, when the jurisdictional facts are in dispute, *Bell v. Hood*, 327 U.S. 678, 681-83 (1946); *Holmberg, supra*, at 396; *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983), and there has been no evidentiary hearing on those issues. Indeed, there is a strong presumption against summary dismissal of a suit on the basis of limitation in such situations. *Smith v. Nixon, supra*, 606 F.2d 1183, 1190 (D.C. Cir. 1979); *Richards v. Mileski*, 662 F.2d 65, 73 (D.C. Cir. 1981). The factual issues raised by the government's motion should have been resolved in plaintiffs' favor, and the motion denied "unless it appear[ed] beyond doubt" that plaintiffs could prove no state of facts entitling them to relief. *Jones v. Rogers Memorial Hospital*, 442 F.2d 773, 775 (D.C. Cir. 1971).

## CONCLUSION

The rulings of the court of appeals on which the government sought review should be affirmed.<sup>26</sup>

Respectfully submitted,

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*February, 1987*

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<sup>26</sup> Plaintiffs respectfully ask the Court then to proceed with consideration of their pending Petition for Writ of Certiorari (No. 86-298), which seeks reversal of certain other rulings adverse to plaintiffs.



# REPLY BRIEF

(11)  
No. 86-510

Supreme Court, U.S.  
**FILED**

**MAR 31 1987**

**JOSEPH F. SPANIOL, JR.**  
CLERK

**In the Supreme Court of the United States**

**OCTOBER TERM, 1986**

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**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**WILLIAM HOHRI, ET AL.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**REPLY BRIEF FOR THE UNITED STATES**

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## In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-510

UNITED STATES OF AMERICA, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

### REPLY BRIEF FOR THE UNITED STATES

In our opening brief, we showed that the court of appeals committed six errors, incorrectly holding that (1) mixed Tucker Act/Federal Tort Claims Act (FTCA) cases are properly appealed to the regional circuit rather than the Federal Circuit; (2) this was a mixed case because respondents' FTCA claims were not frivolous; (3) the statute of limitations had been tolled because the government "misled" this Court in the wartime evacuation cases; (4) tolling was justified because the holdings of those cases precluded claims under the Takings Clause; (5) tolling continued until the government made an "authoritative statement" (J.A. 56) that the evacuation had been a "legal error" (J.A. 60 n.67); and (6) such an "authoritative statement" came in 1980 rather than in a 1976 Presidential Proclamation. Respondents and amici have failed to demonstrate that the court of appeals was correct on any of these points.

1. Resolution of the "mixed case" jurisdictional question requires an inquiry into how Congress intended to

(1)



reconcile two competing policies that are both embodied in the Federal Courts Improvement Act: a policy of placing all nontax Tucker Act appeals in the Federal Circuit and a policy of leaving FTCA appeals in the regional circuits. Respondents demonstrate that the latter policy exists (Resp. Br. 14-15) but do not demonstrate that the latter policy predominates over the former when the two are in conflict, as they are in all mixed Tucker Act/FTCA cases.<sup>1</sup>

Respondents suggest that the key to the jurisdictional puzzle is the Federal Circuit's status as a court of limited jurisdiction (Resp. Br. 13, 17-18).<sup>2</sup> But *all* federal courts are courts of limited jurisdiction, the regional circuits no less than the Federal Circuit (*id.* at 18 n.9; U.S. Br. 19 & n.14). Congress's intent to take Tucker Act cases away from the regional circuits is just as clear as its intent not to make the presence of an FTCA claim a sufficient basis for Federal Circuit jurisdiction.<sup>3</sup> The question is which of two competing policies Congress in-

<sup>1</sup> The two policies could be reconciled by bifurcating appeals in mixed cases, but neither we nor respondents believe that Congress intended that form of reconciliation. Pet. 13 n.14; U.S. Br. 17-19 n.12; Resp. Br. 13-14 n.8.

<sup>2</sup> Respondents' claim of support for their analysis in this Court's decision in *United States v. Mottaz*, No. 85-546 (June 11, 1986), is particularly wide of the mark. Far from "using the same analysis as employed by the court of appeals here" (Resp. Br. 13), the Court explicitly declined to reach the "question of how an appeal raising both issues committed to the Federal Circuit's jurisdiction and issues outside its jurisdiction is to be treated" (*Mottaz*, slip op. 14 n.11).

<sup>3</sup> Indeed, the former policy was part of the very impetus for creation of the Federal Circuit. The latter policy, by contrast, appears to be one that came into play only because the jurisdictional provisions of the FTCA and the Little Tucker Act are both contained in 28 U.S.C. 1346, and the particular way in which various bills were drafted (see U.S. Br. 23-24 nn.16-21) made it necessary to clarify that some but not all Section 1346 claims would give rise, by themselves, to exclusive Federal Circuit jurisdiction.

tended to yield in case of conflict, and the analysis of that question is not advanced by observing that one court or the other has limited jurisdiction.

Respondents' related assertion that "[t]he Federal Circuit was \* \* \* viewed with suspicion" (Resp. Br. 17) is equally unhelpful and, in fact, misleading. The only "suspicion" of the Federal Circuit was expressed by those patent lawyers who unsuccessfully opposed its creation.<sup>4</sup> Congress, by contrast, emphasized that the Federal Circuit was *not* to be regarded as a "specialized court" with limited competence (see U.S. Br. 19-20 n.14). As Congressman Sawyer put it (1981 House Hearings 45):

I feel very good about this bill. I had reservations about it to start with, I guess because of this phobia of a highly specialized court. But this court will have a fungibility, if we want to use that term, with all the other courts of appeals \* \* \*.

Respondents attempt (Resp. Br. 15-16) to draw an inference from the slightly different wording of subsections (a)(1) and (a)(2) of 28 U.S.C. 1295. Section 1295(a)(1) gives the Federal Circuit exclusive jurisdic-

<sup>4</sup> See, e.g., *Industrial Innovation and Patent and Copyright Law Amendments: Hearings on H.R. 6033, H.R. 6934, H.R. 3806, H.R. 2414 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 759-762 (1980) (testimony of Benjamin L. Zelenko, Chairman, ABA Special Committee on Coordination of Federal Judicial Improvements); *Court of Appeals for the Federal Circuit—1981: Hearing on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 69-95 (1981) (statement and testimony of James W. Geriak, ABA) [hereinafter 1981 House Hearings]; *id.* at 110-112, 421-427 (testimony and statement of Benjamin L. Zelenko, Committee to Preserve the Patent Jurisdiction of the U.S. Courts of Appeals); *id.* at 112-152 (statement and testimony of Sidney Neuman and statement on behalf of Bar Association of the Seventh Circuit); *id.* at 250-252, 263-264, 267-268, 271, 296-297 (letters); *id.* at 428-443 (statement of George W. Whitney, ABA).

tion over all 28 U.S.C. 1338 appeals, "except that a case involving a claim arising under any Act of Congress relating to copyrights or trademarks and no other claims under section 1338(a)" is appealed to a regional circuit. Because the "except clause" of Section 1295(a)(2) does not contain the words "and no other claims," respondents infer that it governs when an FTCA claim is raised *with* other claims (including Tucker Act claims) as well as when the FTCA claim stands alone. Although we agree that Section 1295(a)(2) is phrased more ambiguously than Section 1295(a)(1), we submit that the same approach to Federal Circuit jurisdiction is embodied in each subsection. Though less than crystal clear, the language of Section 1295(a)(2) lends itself most naturally to the reading we advocate (see U.S. Br. 20-21) and certainly does not compel the conclusion that "except clause" claims may never be heard in the Federal Circuit, even when joined with claims over which that court would otherwise have exclusive jurisdiction. Moreover, respondents offer no answer to our demonstration (*id.* at 21-25) that the "except clause" of Section 1295(a)(2) lists those Section 1346 claims that Congress gradually determined should not vest *exclusive* jurisdiction in the Federal Circuit, rather than claims that Congress singled out to *divest* the Federal Circuit of its otherwise exclusive jurisdiction over mixed or unmixed Tucker Act cases.<sup>5</sup> Congress's action in moving claims to the "except clause" from the category of exclusive Federal Circuit jurisdiction, without any discussion of an affirmative intention to keep all

<sup>5</sup> Respondents' bald assertion that "Congress \* \* \* clearly viewed tort, tax, and quiet title cases ('except' clause cases) in a special category, and therefore expressly withheld appellate jurisdiction over all such cases from the Federal Circuit" (Resp. Br. 16) is, we submit, conclusively answered by our opening brief. See also J.A. 95-98. Indeed, the assertion that Congress regarded all tort cases as "'foreign' to the Federal Circuit" (Resp. Br. 14) is easily dis-

such claims away from that court, overrides any inference that might be drawn from the different language of subsections (a)(1) and (a)(2).

Finally, respondents renew in their brief (at 18-20) the claim that we conceded away our jurisdictional argument while litigating this case before the D.C. Circuit. That claim is both immaterial and wrong. Parties cannot waive defects in the jurisdiction of a federal court.<sup>6</sup> And in any event, as we demonstrated at the petition stage (U.S. Reply Memo. 2-6), we have never conceded away our jurisdictional argument.<sup>7</sup>

2. There is general agreement between respondents and us that the assertion of nonfrivolous claims in a complaint, and not the ultimate determination whether those claims are jurisdictionally valid, controls the routing of an appeal under Section 1295(a)(2). U.S. Br. 26-27 & n.23; Resp. Br. 18. We contend (U.S. Br. 26-28)

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proven. Consider a case against the government raising both patent claims cognizable under 28 U.S.C. 1338 and business tort claims cognizable under the FTCA. The appeal in such a case would lie in the Federal Circuit under 28 U.S.C. 1295(a)(1).

<sup>6</sup> See Fed. R. Civ. P. 12(h)(3); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 740 (1976); *Pacyna v. Marsh*, No. 84-1706 (Jan. 21, 1986) (order) (remanding for transfer to Federal Circuit even though jurisdictional issue had not been raised in court of appeals); *Ballam v. United States*, No. 84-1750 (Jan. 21, 1986) (order) (same); *Chula Vista City School District v. Bennett*, No. 85-833 (Jan. 27, 1986) (order) (same). But see *Squillacote v. United States*, 747 F.2d 432 (7th Cir. 1984), cert. denied, 471 U.S. 1016 (1985).

<sup>7</sup> We do not repeat here the discussion from our reply memorandum, but we note one new misstatement in respondents' brief. Apparently confusing another brief (see U.S. Reply Memo. 5 n.3; J.A. 5 (docket entry of 1/17/86)) with our petition for rehearing, respondents claim that our petition for rehearing stated that the D.C. Circuit had jurisdiction (Resp. Br. 20). Our petition for rehearing (at 1) in fact stated that "the panel's decision infringes on the exclusive jurisdiction of the Federal Circuit."



and respondents deny (Resp. Br. 18-19) that their FTCA claims were frivolous.

Respondents do not dispute our showing that their FTCA claims are untenable under well-established law, but they say that they are "fully within their rights to seek \* \* \* a modification of existing law" (Resp. Br. 19). Respondents misunderstand the nature of the defect in their FTCA claims. Respondents allude to circumstances that they say are "extraordinary" and should justify a waiver of the administrative-filing requirement of the FTCA, but it has been universally held that *no* set of circumstances can justify a waiver (see U.S. Br. 27-28 & n.24). That is not a judge-made rule; it is the unanimous reading of the intent of Congress in enacting 28 U.S.C. 2401(b) and 2675. Yet respondents have never, at any point in this litigation, offered any argument to suggest that the courts have been mistaken in construing Congress's intent. In these circumstances, respondents' desire to change the existing law simply is not enough to render their claims nonfrivolous.<sup>8</sup>

3. As to the merits, respondents and amici argue that the statute of limitations was tolled because the United States knowingly misled this Court simply by claiming that the wartime evacuation was justifiable. See, *e.g.*, Resp. Br. 7 (emphasis in original) ("government officials *actually knew during the war* that there was no factual justification for the claim of 'military necessity'"); accord Korematsu Br. 15; Calif. Br. 26; ACLU Br. 29; AFSC Br. 7.<sup>9</sup> As we noted in our opening brief (at 31),

<sup>8</sup> If respondents could control appellate jurisdiction by indicating that they sought to change the existing law that unequivocally bars their claims, then every litigant who wishes to control appellate jurisdiction could do the same, and the notion of frivolousness would lose all meaning. We submit that Congress did not intend that result (see U.S. Br. 27).

<sup>9</sup> "Korematsu Br." refers to the brief of amici curiae Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui. "Calif. Br." refers to the brief of amici curiae the States of California and Hawaii. "ACLU Br." refers to the brief of amici curiae the American Civil

however, "military necessity" was (and is) a matter of judgment rather than fact. Whether right or wrong and no matter how deferential, this Court's assessment of the government's judgment of "military necessity" cannot be attributed to government deception as long as the Court was not misled as to the underlying facts. Neither respondents nor amici have shown that this Court was misled as to the pertinent facts.

a. Respondents correctly note (Resp. Br. 23 & n.13) that undisclosed intelligence reports contradicted General DeWitt's *Final Report* insofar as it purported to find evidence of subversive activity among persons of Japanese ancestry. Respondents fail, however, to explain how this Court might have been misled by those assertions of the *Final Report* (which had not even been released at the time of the decision in *Hirabayashi v. United States*, 320 U.S. 81 (1943)). Expressly relying on the arguments made in *Hirabayashi*, before the *Final Report* was completed, the government in *Korematsu v. United States*, 323 U.S. 214 (1944), defended "the military judgment \* \* \* [as] one with regard to tendencies and probabilities as evidenced by attitudes, opinions, and slight experience." Brief for the United States at 11, 57, *Korematsu*. Although we join respondents in finding the inference quite objectionable, it remains true that the presentation to this Court was premised solely on an inference openly drawn from ancestral, cultural, and ethnic considerations (see U.S. Br. 31-32).<sup>10</sup>

Liberties Union, ACLU of Southern California, ACLU of the National Capitol Area, and American Jewish Congress. "AFSC Br." refers to the brief of amici curiae the American Friends Service Committee, the Board of Church and Society of the United Methodist Church, the United Church Board for Homeland Ministries of the United Church of Christ, and the American Jewish Committee.

<sup>10</sup> Respondents scoff at our "incredible" description of the government's wartime arguments (Resp. Br. 21) and contend that the government "was hiding the racial reasons" that led to the evacuation (*id.* at 30). By contrast, amici acknowledge (*Korematsu* Br. 22-28) that the government's arguments (and the Court's decisions)

In addition, the government's lack of reliance on General DeWitt's claims regarding supposed subversive activities was underscored through the explicit dis-incorporation of his allegations by a footnote in the government's *Korematsu* brief (see U.S. Br. 33). Although respondents and amici belittle that disclaimer and point to an earlier, more specific version of it, the disclaimer undoubtedly served its intended purpose of alerting the Court to the government's lack of reliance on the DeWitt claims.<sup>11</sup> Its obvious importance was recognized both at the time and more recently by the Commission on War-time Relocation and Internment of Civilians (see U.S. Br. 33 & n.27).

There is no truth to the suggestion (Resp. Br. 26-28; *Korematsu* Br. 61-64) that the government retracted that disclaimer during the *Korematsu* oral argument. To be sure, the Solicitor General denied that the government had "repudiated the military necessity of the evacuation" simply because it did "not ask the Court to take judicial notice of the truth of every recitation or instance in the final report of General DeWitt" (Tr. 7, *Korematsu*). He likewise denied that the *Final Report* itself somehow proved that General DeWitt "did not believe" that the evacuation was justified by military necessity (*ibid.*). The Solicitor General clearly distinguished, however, between "what the general was thinking" (*id.* at 8-9) and why the government did what it did, stating: "We are not speaking here \* \* \* of merely the judg-

were indeed based entirely on ancestral, ethnic, and cultural considerations. See also Calif. Br. 8. Despite respondents' protestations, it is impossible to read the briefs and opinions in *Hirabayashi* and *Korematsu* and come to any different conclusion. See, e.g., *Hirabayashi*, 320 U.S. at 100.

<sup>11</sup> As we emphasized in our opening brief (at 33 n.27), the *Korematsu* Court's attention was pointedly called to the disclaimer by the brief of the ACLU, and the only Justice who relied on the *Final Report* in his opinion (Justice Murphy, dissenting) used it to attack the evacuation, not to support it (see U.S. Br. 34).

ment of the commanding general in the area" (*id.* at 10; see also *id.* at 16). In accordance with this distinction and with the government's brief, he explained that "page references to the parts" of the *Final Report* on which the government relied were set forth in the brief (*id.* at 10) and repeatedly emphasized that it relied only on matters of "public" and "common" knowledge subject to "judicial notice" (*id.* at 8, 9, 10).<sup>12</sup>

b. Respondents charge the government with a second "deliberate falsehood[,]," relating to its wartime claim that the evacuation was justified because "there was insufficient time to separate the 'loyal' from the allegedly 'disloyal' Japanese Americans" (Resp. Br. 22-23). Respondents contend (*id.* at 24) that the "falsity" of this claim is demonstrated by the opinions of Lt. Commander Ringle and the FBI that a separation could be made. Respondents and amici also argue that an initial draft of General DeWitt's *Final Report* was suppressed because it would have revealed his belief that individual loyalty determinations were impossible, thus showing that the evacuation was based on intractable racism (see Resp. Br. 28-30; *Korematsu* Br. 42-50; Calif. Br. 26; ACLU Br. 7-9; AFSC Br. 9). On both of these points respondents and amici are wrong.

It was no secret at the time *Hirabayashi* and *Korematsu* were decided that there was division within the government as to whether individual hearings, as opposed to mass evacuation, would have provided a timely safeguard against the perceived problem of potentially disloyal Japanese-Americans. With respect to this

<sup>12</sup> Whether the Court should have rejected the government's judicial notice arguments (see *Korematsu* Br. 26) is debatable. Compare Tr. 8-12, 15, *Korematsu*, with Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L.J. 489, 507, 523 (1945). See generally P. Irons, *Justice at War* 135-162 (1983). What is beyond rational debate, however, is that the Court was as competent in the 1940s as it is now to reject that argument, and that the government's reliance on the doctrine of judicial notice therefore is not a basis for tolling the statute of limitations.



precise issue, Ringle's analysis (in its "anonymous" form as an article in *Harpers Magazine*) was cited to the Court over and over again. See Brief for Appellant at 20-21, *Hirabayashi*; Brief of the American Civil Liberties Union, Amicus Curiae, at 15, *Hirabayashi*; Brief for the American Civil Liberties Union, Amicus Curiae, at 23 n.11, *Korematsu*; Brief of Japanese American Citizens League, Amicus Curiae, at 107-108, *Korematsu*. On this point, as on the aspects of the Ringle report discussed in our opening brief (at 35-37 & nn.29-30), the government did not commit fraudulent concealment by failing to attribute to named individuals dissenting positions that the Court knew full well had been taken within the government.<sup>13</sup>

Even less justified is the second claim of respondents and amici (which the court of appeals did not even address). They argue that the 1981 discovery in the National Archives of an initial draft of General DeWitt's *Final Report* is significant because that draft discloses for the first time that "the decision to intern Japanese Americans was based on racial and cultural prejudice rather than military considerations" (Korematsu Br. 44).<sup>14</sup>

<sup>13</sup> In any case, it is far from clear whether Ringle disagreed with the government's ultimate judgment about the overriding necessity for prompt action. He believed that the majority of Japanese-Americans were loyal and that the "Japanese Problem" \* \* \* should be handled on the basis of the *individual*" (J.A. 229), but he recommended (J.A. 236) that individual loyalty hearings be undertaken as the "means whereby potentially dangerous" Japanese-Americans were identified and isolated, and he ventured no opinion on how quickly such a process could be completed. His report did not even purport to assess "the immediate possibility of an attempt at invasion somewhere along the Pacific Coast" (*Hirabayashi*, 320 U.S. at 112). Accordingly, Ringle's belief that a "sorting process" was feasible simply did not address the crucial question whether "the nation could afford to \* \* \* take the time to do it" (*id.* at 107 (Douglas, J., concurring)).

<sup>14</sup> A number of revisions were made to General DeWitt's initial draft before the *Final Report* was accepted and published by the

The argument that the government commits "fraudulent concealment" when it edits (rather than releases) the first draft of an official publication is astounding. The first draft of the *Final Report* did not reveal any *facts* that the government suppressed in the editing process; it revealed certain opinions held by General

War Department. See *Hirabayashi v. United States*, 627 F. Supp. 1445, 1450-1452 (W.D. Wash. 1986), appeals pending, Nos. 86-3853, 86-3887 (9th Cir.). Respondents and amici focus on two of those changes: (1) substitution of the statements that "no ready means existed for determining the loyal and the disloyal with any degree of safety" and that "a positive determination could not have been made" for the statements that "[i]t was impossible to establish the identity of the loyal and disloyal with any degree of safety" and that "[i]t was not that there was insufficient time in which to make such a determination \* \* \* [but] that a positive determination could not be made"; and (2) substitution of the statement that "loyalties were unknown, and time was of the essence" for the statement that "security of the Pacific Coast continues to require the exclusion of Japanese from the area now prohibited to them and will continue for the duration of the present war." *Korematsu Br.* 47-48; see also *Resp. Br.* 29.

These changes were made so that it would be clear that the government did not believe that all Japanese-Americans needed to be excluded from the West Coast for the duration of the war. That clarification was necessary because, as the *Final Report* was being drafted, the War Department was taking the first steps to establish a program to end the mass exclusion of Japanese-Americans. See Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 214, 222-223 (1982) [hereinafter *Personal Justice Denied*]; see also J.A. 116-118. These revisions of the *Final Report* paralleled a contemporaneous clarification of the government's position by means of a supplemental memorandum filed with the Court in *Hirabayashi*. Certain statements in the government's main brief (at 61-63) had been taken as an assertion "that no hearing could determine whether a given individual was loyal or not" (Appellant's Reply Brief at 13). In response, the government filed a supplemental memorandum stating: "Our position is not that hearings are an inappropriate method of reaching a decision on the question of loyalty. \* \* \* It is submitted, however, that in the circumstances \* \* \* this method was not available to solve the problem which confronted the country." Memorandum for the United States at 1-2, *Hirabayashi*.

DeWitt that simply were not the views of the United States and therefore were appropriately excised.<sup>15</sup>

Nor is it at all tenable to suggest that this Court would have decided *Hirabayashi* or *Korematsu* differently had it only known of General DeWitt's personal views. General DeWitt's opinions were "expressed often and publicly" (*Personal Justice Denied* 216), in congressional testimony and elsewhere, and included statements more patently offensive than anything edited out of the *Final Report* (see, e.g., *id.* at 221-222; J.A. 251). The wartime briefs presented that testimony and those views to the Court in an unsuccessful attempt at precisely the same argument that respondents and amici now seek to make—i.e., that racial prejudice, not a judgment with respect to military necessity, motivated the evacuation. See Appellant's Reply Brief at 1 n.2, *Hirabayashi*; Brief *Amicus Curiae* of Japanese American Citizens League at 114-115, *Hirabayashi*; Brief for Appellant at 63, *Korematsu*; Brief of Japanese American Citizens League, *Amicus Curiae*, at 11, 108, 197-199, *Korematsu*; Petition for Rehearing at 17-18; *Korematsu*; see also *Korematsu*, 323 U.S. at 235-239, 241 n.15 (Mur-

<sup>15</sup> Respondents and amici apparently believe that General DeWitt alone made the judgment that evacuation of Japanese-Americans from the West Coast was necessary, and that a report that did not reflect his personal views therefore must have been misleading. See, e.g., ACLU Br. 4. The decision in question, however, was not made by General DeWitt alone, but rather at the highest levels of government. See *Personal Justice Denied* 72-86. Indeed, General DeWitt was advised early on that his personal views were at odds with those of his superiors, and that the government's reason for the evacuation was that "we thought the front was immediate [and] [w]e couldn't sort them out immediately." *Hirabayashi*, 627 F. Supp. at 1453 (quoting transcript of January 18, 1943, telephone conversation between General DeWitt and Assistant Secretary of War McCloy). According to *Personal Justice Denied* 222, the first draft of the *Final Report* was edited precisely because McCloy considered it "DeWitt's attempt to talk past his War Department superiors to politicians and the public."

phy, J., dissenting).<sup>16</sup> In short, this supposedly critical "concealed" evidence was spread before the Court at the time, if not by the government, then by its opponents.

4. Respondents in any event fail to show that this Court's decisions in *Hirabayashi* and *Korematsu* precluded timely suit on their Takings Clause claims. Respondents contend (at 31-34) that the "military necessity" found in those cases would have barred taking claims. See also Calif. Br. 17-18; AFSC Br. 5. As we demonstrated in our opening brief (at 37-38), however, the holdings in *Hirabayashi* and *Korematsu* were specifically limited to sustaining the necessity for temporary controls on personal movement, and they did not purport to suggest the presence of military necessity such as would justify a taking of property.<sup>17</sup>

<sup>16</sup> Remarkably, amici simultaneously argue that quotations of General DeWitt in materials publicly available 40 years ago make it "evident" that the "sole predicate" for the evacuation was his "unbridled racism" (ACLU Br. 15-17), and (*id.* at 7-9) that the statute of limitations was tolled because of "a conspiracy" to cover up such racial animus, as supposedly is demonstrated by the revision of the *Final Report*.

<sup>17</sup> In this, the situation addressed in *Hirabayashi* and *Korematsu* differs entirely from that in *United States v. Pacific R.R.*, 120 U.S. 227 (1887), on which respondents rely. In that case property had been destroyed by a retreating Union army in order to impede the advance of Confederate forces. This Court described that kind of loss as "'occasioned, not wilfully, but through necessity and by mere accident,'" and distinguished it from a loss "'done by the state deliberately and by way of precaution'" (120 U.S. at 234-235). "[P]roperty injured or destroyed during war," the Court then held, is exempt from just compensation requirements when its loss is merely incidental to "the operations of armies in the field, or [to] measures necessary for their safety and efficiency," but no such exemption exists "where property of loyal citizens is taken for the service of our armies" (*id.* at 239). Contrary to respondents' apparent suggestion, the distinction thus drawn in *Pacific R.R.* did not create "rigid rules \* \* \* to distinguish compensable losses from noncompensable losses," and left "[e]ach case [to] be judged on its own facts" with respect to which of the paradigms that the



Because this Court's decisions in *Hirabayashi* and *Korematsu* did not even consider whether property lost as a result of the evacuation was "taken" in the constitutional sense, the question whether evacuees could successfully bring taking claims was, at the very least, fairly open to debate; certainly, that question would have been eminently appropriate for litigation immediately after the war. Cf. Rostow, *supra*, 54 Yale L.J. at 516-519 (arguing that, if the Court had applied the "military necessity" test used in taking cases, the facts relied on in *Hirabayashi* and *Korematsu* would not have established such necessity). Yet, although evacuees may have brought "unavailing claims for compensation" under various theories after the war (Resp. Br. 22), no Takings Clause claims were filed, let alone rejected, in the four decades between the war and the present suit.

Respondents are quite wrong in their citation (at 35-36) of the Japanese-American Evacuation Claims Act of 1948, 50 U.S.C. (& Supp. II) App. 1981-1987, and the allegedly inadequate compensation under that Act, as evidence that Takings Clause suits were precluded. That Act stemmed from the government's recognition that the evacuees were not mere "casualties of the war," that the unique losses that they suffered had been "inflicted \* \* \* by a voluntary act of the Government," and that "redress" for those losses was "simple justice." H.R. Rep. 732, 80th Cong., 1st Sess. 5 (1947). These official concessions, far from supporting a preclusion of Takings Clause claims, would have been inconsistent with reliance on "military necessity" as a defense against such claims.

Moreover, in administering the Act, the Attorney General concluded that the "claims [it invited] had, or that they should now be regarded as having had, substantive existence prior to the enactment of the statute affording the remedy" (*Claim of Fumiyo Kojima*, 1 Adj. Att'y Gen.

Court described it most closely approached. *United States v. Caltex, Inc.*, 344 U.S. 149, 156 (1952). Compare, e.g., *United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871), with, e.g., *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851).

209, 212 (1951); see also *Claim of George M. Kawaguchi*, 1 Adj. Att'y Gen. 14, 17 (1950)).<sup>18</sup> In addition, once Congress conferred jurisdiction on the Court of Claims to determine evacuees' claims under the Act (50 U.S.C. App. 1984(b)), that court actually interpreted its authority as permitting it to award *more* than just compensation, on the theory that its statutory mandate gave it freedom "to depart from the legalistic strictures of the normal rule." *Sonoda v. United States*, 154 Ct. Cl. 130, 140-141 (1961). If anything, then, proceedings under the Act tend to demonstrate that *Hirabayashi* and *Korematsu* would *not* have prevented evacuees from seeking full compensation for any taking of their property.

5. If, despite everything we have said, the statute of limitations was tolled, then, as the district court held, tolling ended "long ago" (J.A. 142). The evidence arguably material to a "military necessity" claim, but not revealed during wartime, had all appeared in government and other publications by 1950 and continued to be discussed through the years (see U.S. Br. 42-43 & n.36). The court of appeals rejected the obvious conclusion that any tolling therefore ended decades ago (see U.S. Br. 43-45), holding instead that it would end only with an authoritative admission of "legal error" (J.A. 60 n.67). That novel and untenable theory, which effectively abrogates the statute of limitations, is given only the most cursory nod by respondents, who deny (Resp. Br. 40) that the court below intended to espouse a "general rule" but fail to answer our showing (U.S. Br. 45-49) that

<sup>18</sup> Respondents' assertion (at 35-36) that the Attorney General's construction of the 1948 Act in *Claim of Mary Sogawa*, 1 Adj. Att'y Gen. 126 (1950), "confirm[s] Congress' belief that military necessity absolved the government from *any* Takings liability" seriously misreads the *Sogawa* decision. In *Sogawa*, the Attorney General concluded that what the Act did not permit was compensation on the theory that claimants' evacuation "had constituted an actionable wrong to their persons, entitling them to relief on the analogy of the law of tort damages" (*id.* at 131). That the evacuation could not be considered *tortious* "in the teeth of \* \* \* *Kor[e]matsu*" (*id.* at 134) hardly undermines the recoverability of just compensation on a *takings* theory.

*Hirabayashi* and *Korematsu* could not justify (if anything could) invention of a special non-rule for this case.<sup>19</sup>

Instead, respondents rely (Resp. Br. 44) on a theory that was unanimously rejected below—that the statute of limitations was tolled until discovery of “proof that the government concealed the true facts from this Court \* \* \* and that the government’s concealment was knowing, rather than just a mistaken judgment on the issue of military necessity.” Under this theory, respondents argue that the statute of limitations did not begin to run until 1981, when disclosure of the Ennis and Burling memoranda (J.A. 264-276) and discovery in the National Archives of the initial draft of the *Final Report* are said to have provided “the first direct evidence of deliberate governmental misconduct sufficient to stand a chance of overcoming this Court’s approval of the government’s claim of military necessity” (Resp. Br. 47).

We have addressed (pp. 10-13, *supra*) respondents’ assertions regarding the significance of the initial draft of the *Final Report*. The failure to disclose that document during the wartime litigation was not fraudulent concealment. *A fortiori*, its belated discovery in the National Archives cannot be determinative of when respondents had sufficient notice to require timely prosecution of their claims.

Nor are the Ennis and Burling memoranda relevant. The court of appeals correctly held (J.A. 59) that those documents reflect no more than “one side of a heated debate within the Justice Department, and between Justice and the War Department, on the appropriateness of

<sup>19</sup> Respondents do suggest (Resp. Br. 47) that “the purposes of a statute of limitations are [not] contravened by this suit” because “[t]he evidence \* \* \* has not been lost,” but, even aside from their dubious premise (see, e.g., *Personal Justice Denied* 118-119), the applicability of a statute of limitations does not turn on ad hoc inquiry by the courts with respect to the staleness of a particular case. “These enactments are statutes of repose” that “represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time.” *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

the evacuation policy.” Both of the courts below found that the Ennis and Burling memoranda are not themselves “probative of military necessity” (J.A. 144; see also J.A. 59). If the statute of limitations was ever tolled, the tolling ended with publication in the late 1940s of the Ringle, Fly, and Hoover documents that Ennis and Burling discuss, not the later publication of the Ennis and Burling memoranda (see J.A. 145-146). In any event, disclosure of the Ennis and Burling memoranda actually revealed nothing new, for it “long” had been “apparent” that the government knew of, but did not present to this Court, the Ringle, Fly, and Hoover documents (see J.A. 146; U.S. Br. 42-43 n.36). On these more than ample grounds, both courts below recognized that the alternative theory to which respondents have retreated will not work.<sup>20</sup>

Amici likewise rely almost exclusively on reasoning other than that used by the court below. For example, amici *Korematsu*, et al., argue (at 17) that the claims in this case should be found timely for the same reasons that the district courts in their coram nobis cases concluded that laches did not preclude their petitions. Yet amici concede (*ibid.*), as they must, that the statute of limitations issue in this case “differs from the equitable

<sup>20</sup> Respondents, in passing, attempt to construct other alternative theories in support of the judgment below. For example, they argue (at 45-46) that their delay in pressing their claims may be “reasonable[]” because “[t]hey were consistently advised that there was no legal right of action against the United States.” If that is true, respondents appear to have received bad advice (see U.S. Br. 46 & n.38 (quoting Rostow, *supra*, 54 Yale L.J. at 533)), but in any event the argument that a putative plaintiff can be excused from the statute of limitations because he has been “told that he does not have a case” was rejected by this Court in *United States v. Kubrick*, 444 U.S. at 124. Respondents also argue (at 47-49) that the government should be estopped from raising the statute of limitations—a suggestion that both courts below correctly rejected. See J.A. 49 n.53, 137-138 n.22. Finally, respondents offer a pro forma argument (at 49) that disputed factual matters make dismissal of their complaint inappropriate. The district court, however, correctly held (J.A. 156) that “[t]here are no disputes about material facts” relevant to the statute of limitations issue.



laches defense in the coram nobis cases." In any event, amici's tolling theory apparently is predicated on the government's supposed violation of a prosecutorial "duty to produce exculpatory evidence" (*id.* at 18), but tolling on that theory plainly could not continue after such evidence was in fact revealed, which in this case occurred decades ago. And, to the extent that amici's tolling theory might instead be keyed to discovery of alleged direct evidence of government misconduct, such as the Ennis and Burling memoranda, the theory is the same as respondents' and equally without merit.<sup>21</sup>

Amici California and Hawaii suggest (at 5) two "alternative grounds" for finding the complaint in this case timely. One such ground (Calif. Br. 24-26) is just the same as respondents' argument about the first draft of the *Final Report* and is equally meritless (see pp. 10-13, *supra*). The other is a remarkable suggestion (Calif. Br. 14-23) that the statute of limitations was tolled until Congress could be said to have repudiated the "military necessity" rationale even "if the government did not mislead this Court in the wartime cases." This suggestion of course forsakes all pretense that this case involves the

<sup>21</sup> Other amici make the same argument accompanied by an assertion (ACLU Br. 4) that "ordinary principles of fraudulent concealment" make the claims in this case timely. They dramatically contend (*id.* at 29) that "the government blatantly lied to the Court when it knew there was no 'military necessity' for the evacuation and that respondents 'had a claim only when they learned of this deception.'" Amici assert (*id.* at 38) that respondents' claims did not accrue until "public release of the documents indicating the government's fraud on this Court." See also AFSC Br. 7-8. Once more, however, the rejection of this "alternative" by the courts below was well founded. Respondents for their taking claims must rely on "concealed" evidence, not evidence of "concealment," to establish "the specific wrong complained of" and "the gravamen of the action." *Wood v. Carpenter*, 101 U.S. 135, 138 (1879). Accordingly, even if there were merit (which there is not) to amici's contention that materials disclosed in the 1980s tend to show government misconduct, the statute of limitations on respondents' taking claims still would have been triggered 30 or more years earlier, when all of the evidence probative of military necessity became available.

doctrine of fraudulent concealment. It stands in stark derogation of the principle that conditions on the waiver of sovereign immunity must be strictly construed, since it would apply against the United States a non-fraudulent-concealment tolling theory that applies to no other litigant. Cf. *Kendall v. United States*, 107 U.S. 123, 125 (1882).

6. Finally, we demonstrated in our opening brief (at 49-50) that, if the court of appeals was right in holding that an "authoritative statement" was needed to start the running of the statute of limitations, it came in 1976, not in 1980. Respondents counter by asserting that the President in 1976 admitted only an "honest error of judgment" (Resp. Br. 41), whereas Congress in 1980 determined that "the time for \* \* \* remedies had clearly come" (*id.* at 42). That assertion misstates the significance of Congress's 1980 action, which left the question of remedies for ultimate legislative resolution (see 50 U.S.C. App. 1981 note § 4; see also, *e.g.*, H.R. 442, 100th Cong., 1st Sess. (1987)).<sup>22</sup> Moreover, there is no conceivably relevant difference between a confession of "honest" error and the confession of "dishonest" error that respondents apparently would require, nor did the 1980 legislation remotely suggest any such "dishonest" error. As these strained attempts to support it show, the theory of the court of appeals falls of its own weight. See also U.S. Br. 50 n.42.

For the foregoing reasons and those given in our opening brief, the judgment of the court of appeals should be vacated with directions to transfer the appeal to the Federal Circuit, or reversed on the merits.

Respectfully submitted.

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Solicitor General

MARCH 1987

<sup>22</sup> Indeed, the significance that respondents ascribe to the 1980 legislation establishing the Commission could far more plausibly be attributed to the 1948 Evacuation Claims Act. See pp. 14-15, *supra*; see also U.S. Br. 38 n.31.

**AMICUS CURIAE**

**BRIEF**



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

UNITED STATES OF AMERICA,  
*Petitioner,*  
v.  
WILLIAM HOHRI, *et al.*,  
*Respondents.*

On Writ of Certiorari to the United States Court of  
Appeals for the District of Columbia Circuit

**BRIEF AMICI CURIAE OF THE STATES OF  
CALIFORNIA AND HAWAII IN SUPPORT OF  
RESPONDENTS**

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**QUESTIONS PRESENTED**

1. Whether the court below properly announced and applied a rule postponing the accrual of Takings Clause claims arising from the removal from the Western United States of Japanese-Americans and resident Japanese aliens pursuant to Executive Orders issued by the President, as Commander-in-Chief under a declaration of war, statutorily ratified by Congress, and judicially approved by this Court, until the war-making branches of the United States suggested the absence of any military necessity for the removals?

2. Whether the regional court of appeals for the District of Columbia Circuit had jurisdiction to hear and decide the appeal in which the foregoing rule of accrual was announced and applied to the unique facts of this case?



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IN THE  
**Supreme Court of the United States**  
 OCTOBER TERM, 1986

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**No. 86-510**

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UNITED STATES OF AMERICA,  
*Petitioner,*  
 v.  
 WILLIAM HOHRI, *et al.*,  
*Respondents.*

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**On Writ Of Certiorari To The United States Court Of  
 Appeals for the District Of Columbia Circuit**

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**BRIEF AMICI CURIAE OF THE STATES OF  
 CALIFORNIA AND HAWAII IN SUPPORT OF  
 RESPONDENTS**

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**INTEREST OF THE AMICI CURIAE**

The States of California and Hawaii have a compelling interest in seeing that justice is not denied again to the tens of thousands of Americans of Japanese ancestry and loyal Japanese permanent residents removed from their homes and interned by the federal Government during World War II.

The interests moving us to stand with Respondents are several. Each of us, within our respective jurisdictions,

bear the legacy of this tragic episode.<sup>1</sup> In California, where the largest number of internees resided, entire communities of men, women, and children were forcibly uprooted from their homes. Businesses and farms that had taken generations to build were destroyed in a period of weeks. As documented by the Commission on Wartime Relocation and Internment of Civilians (Commission), business properties and family possessions alike were disposed of at distress prices, or, under the pressure of military orders, were left without being secured. Without doubt, the internment program changed forever the social, economic, and political history of our most populous State.<sup>2</sup>

In the then-Territory of Hawaii, where World War II began, Executive Order 9066 also had its impact. Pursuant to that Order, which was made effective in Hawaii on October 12, 1942, a total of 1,875 citizens and resident aliens were removed to relocation centers on the mainland operated by the Justice Department or the War Relocation

<sup>1</sup> We note for the record that in both *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944), the then-Attorney General of California joined in briefs *amici curiae* in support of affirming the convictions of the defendants in those cases. *Hirabayashi*, 320 U.S. at 83; *Korematsu*, 323 U.S. at 214. There appears to be historical evidence that these briefs were in fact prepared in substantial part by the United States Department of Justice. See *Korematsu v. United States*, 584 F. Supp. 1406, 1419 n.9 (N.D. Cal. 1984).

The then-Attorney General of Hawaii did not take a position in *Hirabayashi* or *Korematsu*. In *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), which did not involve a racially discriminatory war measure, but rather the continuous denial of habeas corpus to all persons in Hawaii regardless of race from December 7, 1941, to April, 1944, the Hawaii Attorney General filed a brief and argued in opposition to the position of the United States. *Id.*

<sup>2</sup> Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 42-44, 117-33 (1982). At least 42,000 American citizens of Japanese ancestry resided in California at the time of the evacuation. See *id.* at 65.

Authority. The enduring irony—and irrationality—of the Government's implementation of Executive Order 9066 is reflected in the well-known statistic that in Hawaii, in the heart of the Pacific Theater, fewer than 2,000 of the nearly 158,000 ethnic Japanese were interned.<sup>3</sup> Yet, as the Commission's evidence shows, the basis for detention in Hawaii often did not differ in principle from that in California, where ethnic Japanese within the military zones were incarcerated on a theory that they could not be trusted because "no sabotage has taken place."<sup>4</sup> To those in Hawaii who were similarly interned, the injustice was no less great.

To the President, the Congress, and this Court, the internment was justified by the military authorities on the basis of "military necessity." Thirty-eight years later, Congress acknowledged that, "apparently," the only basis for the Government's forced removal of these persons was "ethnic origins." S. Rep. No. 751, 96th Cong., 2d Sess. 2 (1980).

This action was commenced in 1983 by nineteen individuals, former internees or their representatives, to seek redress from the Government for themselves, and a class of 120,000 persons alleged to have been victimized by the internment program.

Many of the named plaintiffs, as the complaint alleges, were citizens of the United States and of California at the time of the internment orders. Today in California, where the largest number of ethnic Japanese in the Nation reside,<sup>5</sup> there doubtless remain thousands of members of the potential class. Based on the number of internees who returned to Hawaii, we believe the number of potential

<sup>3</sup> *Id.* at 277.

<sup>4</sup> *Id.* at 4; cf. *id.* at 279 (testimony of Hawaii internees).

<sup>5</sup> See United States Dep't of Commerce, *Statistical Abstract of the United States* 29 (1986) (table).



class members in our Fiftieth State is substantial as well. Numerous other Americans of Japanese ancestry, who were wrongfully stigmatized by the World War II exclusion and evacuation orders, yet who may not under this Court's decisions have standing to litigate these less direct injuries, also reside in our respective States.

Yet, in the end, it is as Americans that we have a vital interest in seeing that appropriate redress is awarded in the Courts, if possible, in Congress, if necessary. We thus appear today out of our commitment to the ideal of personal liberty and nondiscrimination embodied in our state constitutions, and out of our shared belief that the federal Constitution truly is "committed to eradicating discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (Burger, C.J., for a unanimous court).

Last year, the United States Court of Appeals for the District of Columbia held that, with respect to any claims for violation of the First, Fourth, Sixth, Eighth, and Thirteenth Amendments, the prohibitions on Bills of Attainder and Ex Post Facto Laws, and numerous other grounds for relief, redress lies, if at all, with Congress. These claims are not at issue on the instant writ, and we do not believe it proper to address them.

The court held that one claim, that for compensation under the Takings Clause for the military's actions that "totally or substantially destroyed plaintiffs' real or personal property," could go forward pursuant to the waiver of sovereign immunity embodied in 28 U.S.C. § 1346(a)(2) (1982), known commonly as the "Little Tucker Act." We believe that, under the unique circumstances of this case, this holding was correct, and that the court below also properly exercised appellate jurisdiction.

We do so notwithstanding that, as sovereign entities within our respective territories, we are acutely aware of, indeed, vigorously subscribe to, the well-accepted rule that waivers of sovereign immunity are to be strictly construed.

Although once justified by little more than the maxim that "The King can do no wrong," the sovereign immunity retained by the United States, no less than that enjoyed by the States, performs the task of ensuring, as Justice Marshall wrote in *Kosak v. United States*, 465 U.S. 848 (1984), "that 'certain governmental activities' not be disrupted by the threat of damages suits[.]" *Id.* at 858. The force given to separation of powers concerns through the law of sovereign immunity is reflected well in Justice Jackson's statement that it is no actionable wrong "for government to govern." *Dalehite v. United States*, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting).

It is these very separation of powers concerns, however, that lead us in this case to stand with Respondents. A central question here concerns the interplay of separation of powers principles and the inquiry mandated by the Takings Clause. Specifically, it is whether the court below correctly defined a rule of accrual that applies to wartime takings in designated military zones pursuant to explicit orders of the Commander in Chief, and for which the Government seeks and obtains approval from Congress and this Court under a claim of military necessity that is, in fact, unfounded. Another important question is the proper remedy for material omissions by the wartime Government on matters of the greatest significance before this Court. On these issues, the lower court held that the Government should not be allowed, at this time, to ignore the effects of the World War II exclusion cases. We believe these rulings were correct, and that the concerns by the United States that the lower court departed from settled principles and logic are misplaced.

At the same time, if our view is correct, many of the arguments raised by Respondents in support of the judgment below may be unnecessary to an affirmance. Because the alternative grounds we advocate may not be fully explored by the Respondents, we submit this brief as an aid to the Court. As to the issues of appellate jurisdiction

presented by the Petition, we defer to the Respondents' able presentation.

### STATEMENT OF THE CASE

The ultimate issue in this case is whether the courts of the United States, having ratified the wartime evacuation of Japanese-Americans and longtime loyal resident aliens solely on account of their race, are closed to every claim that might be brought against the Government for monetary relief.

On January 21, 1986, the Court of Appeals exercised appellate jurisdiction over the District Court's judgment terminating on the pleadings the internees' more than twenty causes of action as having been brought beyond the limitations period. The Court of Appeals held that one, and only one, claim could proceed to discovery. That claim, brought under the "Little Tucker Act," 28 U.S.C. § 1346(a)(2), is for takings breaching the Just Compensation Clause. *Hohri v. United States*, 782 F.2d 227, 253 (D.C. Cir. 1986) (J.A. 13, 60). See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1020-21 (1984); *United States v. Mitchell*, 463 U.S. 206, 218 (1983).

To reach its conclusion, the court, noting "the procedural posture of this case" (J.A. 58), began with the premise that, until the public record, or facts obtainable by due diligence had matured to the point where the internees would have been able "to survive a threshold motion to dismiss" (J.A. 53 n.57), the six-year limitations period, 28 U.S.C. § 2401 (1982), did not begin to run. The court implicitly reasoned that this rule applied not only to the *prima facie* elements of the internees' takings claims, but also to any defenses that would be obvious on the face of the pleadings, or from judicially noticeable matter upon which the Government could properly rely on a Rule 12(b) motion (J.A. 55); see *Papasan v. Allain*, 106 S. Ct. 2932,

2943 (1986) (considering "the public record" at Rule 12 stage).

Turning to "the particular cause of action" for an uncompensated taking, and "the inquiry required by the Just Compensation Clause,"<sup>6</sup> the court assessed the impact of a rule of takings law older than the Tucker Act itself: "the exemption of government from liability for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency." *United States v. Pacific Railroad*, 120 U.S. 227, 239 (1887); see also *United States v. Caltex*, 344 U.S. 149, 154-55 (1952), cited, *Hohri*, 782 F.2d at 251 (J.A. 55).

In this context, the court was required to revisit and analyze the origins, holdings, and significance of two of the most controversial decisions of this Court: *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944). In *Hirabayashi*, the Court held that it did not violate any right to substantive due process for the President to issue Executive Order 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942), allowing the establishment of "military areas" subject to "whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion"; for Congress to make criminal "any [knowing] act . . . contrary to the restrictions applicable to any such area or zone," Act of Mar. 21, 1942, ch. 191, 56 Stat. 173; for an authorized military commander under the Order to establish a military zone for "all the coastal region of the three Pacific Coast states, including the City of Seattle," and to impose a curfew applicable in that zone to no citizens other than those "of Japanese ancestry," 7 Fed. Reg. 2543 (Mar. 24,

<sup>6</sup> *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S. Ct. 3108, 3119 (1985) (describing ripeness bar to takings claims when procedures for regulatory variances have not been pursued and every reasonable use has not been denied).



1942); and for a court of the United States to inflict a criminal penalty upon a concededly loyal American citizen of Japanese ancestry for breaking the curfew. 320 U.S. at 85-88, 100-105.

Noting that "in other and in most circumstances racial distinctions are irrelevant," *id.* at 101, the Court still held that "findings of danger from espionage and sabotage, and of the necessity of the curfew order to protect against them, have been duly made." *Id.* at 103. It did so because of reports that espionage facilitated the attack on Pearl Harbor, *id.* at 96; ethnic Japanese were subject to *de jure* discrimination preventing "assimilation," *id.*; some ethnic Japanese attended Japanese language schools, *id.* at 97, or were schooled in Japan, *id.*; many Japanese-Americans were "deemed, by Japanese law, to be citizens of Japan," *id.*; and "resident alien Japanese" held "positions of influence in Japanese communities," *id.* at 98. On these "data," *id.*, the Court refused to reject "as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained." *Id.* at 99. Thus the Court held that the "war-making branches" had "ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with." *Id.* The "data" were also deemed sufficient to support the curfew as meeting "the danger of espionage and sabotage to our military resources." *Id.* at 104. The decision was unanimous. Three Justices filed concurrences. *Id.* at 105-14.

In *Korematsu*, the Court addressed the validity of an order excluding, on six days' notice, all ethnic Japanese, citizens and aliens, and no other citizens, from a military zone. 323 U.S. 214, 220. Relying on the "serious consideration" given to the measure in *Hirabayashi*, the military's reliance on "the same ground" advanced in *Hirabayashi*—the "impossibility" of bringing about "an immediate segregation of the disloyal from the loyal"—the

Court upheld a conviction for violating the order. *Id.* at 218-19. As in 1943, the Court ruled as it did not only because "the properly constituted military leaders" felt "that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily," but also "because Congress . . . determined that they should have the power to do so." *Id.* at 223. Concurring, Justice Frankfurter emphasized, "[t]hat is their business, not ours." *Id.* at 225. Justices Roberts, Murphy, and Jackson filed vigorous dissents. *Id.* at 225-48.

The court below, after analyzing the opinions and briefs in *Hirabayashi* and *Korematsu*, held, absent "an authoritative statement by one of the political branches, purporting to review the evidence when taken as a whole," that Respondents could not have overcome a defense to takings claims arising from the exclusion program. *Hohri*, 782 F.2d at 251 (J.A. 56). Only when such a statement issued, would there be "reason to doubt the basis of the military necessity rationale," *id.* at 253 (J.A. 56), and the internees would have a fair chance to litigate whether, in fact, the military necessity defense would apply. *Id.* at 252 n.63, 253 n.68 (J.A. 57, 61). If, at a trial, the Government could show "countervailing intelligence data" rejecting the claim that there were no intelligence analyses justifying the need for a mass evacuation based on race, the Government would prevail. *Id.* at 252 (J.A. 57). But as to the threshold question whether the internees would be allowed into court, the panel determined that, in light of "previous congressional and Supreme Court approval" of the exclusion orders, the first "authoritative statement" casting doubt on the military justification for the exclusion programs was to be found in the Act of July 31, 1980, Pub. L. 96-317, 94 Stat. 964, which created the Commission on Wartime Relocation and Internment of Civilians. 782 F.2d

at 253 (J.A. 59).<sup>7</sup> Prior to that time, the political branches had not expressed a degree of doubt about the impracticality of separating "the loyal from the disloyal" such that it would have been fair to require the internees to litigate their takings claims. *Id.* at 253 n.67 (J.A. 60 n.67) (1976 repeal of Executive Order 9066).

The Court of Appeals also determined that it had appellate jurisdiction to reverse the District Court's dismissal of the Takings Clause claims. 782 F.2d at 240-41 (J.A. 32-33). The court held that 28 U.S.C. § 1295(a)(2) (1982) referred appeals from the district courts to the regional courts of appeals if the trial court's jurisdiction was invoked under both the Tucker Act, 28 U.S.C. § 1346(a)(2), and the Federal Tort Claims Act, 28 U.S.C. § 1346(b). 782 F.2d at 240 (J.A. 33). Because Respondents' FTCA claims were "hardly . . . frivolous," 782 F.2d at 240 n.27 (J.A. 33 n.27), the majority held it was not appropriate to refer the appeal to the Federal Circuit. *Id.*

Chief Judge Markey of the Federal Circuit, sitting by designation, dissented from the panel decision, which he believed improperly expanded the law of equitable tolling. *Id.* at 261 (J.A. 76). He argued, first, that three reports (the Fly, Hoover, and Ringle memoranda), which were available to the Department of Justice when its brief in *Korematsu* was filed, which were not fully disclosed in the *Korematsu* brief, and which indicated charges of Japanese American disloyalty were baseless, had been published in the late 1940's and provided a basis for a takings claim in the 1950s. *Id.* He also asserted that even if the internees' claims were hopeless, they still should have filed suit earlier because any adverse judgment could have been re-

<sup>7</sup> The court noted that even the American-Japanese Evacuation Claims Act of 1948, 50 U.S.C. App. § 1981 (1982), evinced a belief in the military justifications for the evacuations, as to which the federal courts, in any Tucker Act case, would be required to give deference. *Id.* at 255 (J.A. 63).

opened under Rule 60(b) if "new evidence" came to light. *Id.* at 262 (J.A. 78). Chief Judge Markey also vigorously dissented from the majority's assertion of any appellate jurisdiction. *Id.* at 257-60 (J.A. 68-74).

Five of the active circuit judges, including then-Circuit Judge Scalia, dissented from the denial of rehearing *en banc*. Judge Bork, writing for the dissenters, noted that the statute should be deemed to have run because the takings claims were not doomed to the "certainty of defeat" in the early 1950s. 793 F.2d at 308 (J.A. 92). Judge Bork argued such "certainty" could not be shown because "the loss of homes and businesses" was not required by the holding in *Korematsu*. *Id.* In his view, the panel thus established a rule "far more threatening to legitimate civil liberties and to judicial review of government action than any that would have been accomplished through an affirmation of the district court's decision." *Id.* at 307 (J.A. 90). He also criticized the court's assumption of jurisdiction. *Id.* at 308-312 (J.A. 94-100).

In an additional statement, the panel majority responded that, because the only claims allowed to proceed were for those takings "necessarily adjunct to" the military orders upheld in *Hirabayashi* and *Korematsu*, *id.* at 313 n.1 (J.A. 103), the rule urged by the dissenters would require litigants, at the pain of filing claims that would be defeated on the merits, to guess when "a peacetime Court [would] repudiate a wartime Court for ignoring the Constitution's requirements." *Id.* at 314 (J.A. 105). The panel majority thus defended its rule of accrual for the narrow takings claims incident to the exclusion orders as a response to the "whipsaw" created by forcing the internees to litigate in the face of statutes, Executive Orders, military decrees, and two plenary decisions of this Court holding that the military authorities *could* lawfully abridge their most fundamental rights to travel, assemble, and move about communities in which many of them had spent their entire lives absent some indication from the political branches



that the evidence of a risk of sabotage *may* have been insufficient. *Id.* The panel also defended its jurisdictional rulings. *Id.*

### SUMMARY OF ARGUMENT

In passing on whether the takings claims in this case were timely brought, the court of appeals was required to balance, on the one hand, the Government's interest in prompt adjudication against, on the other, the separation of powers concerns raised by the military necessity defense to wartime takings, and the due process interests implicated by a premature expiration of a statute of limitations. Under the unique circumstances of this case, the lower court struck that balance in a proper fashion.

In arguing to the contrary, the Solicitor General presents a number of contentions that, on their face, raise serious concerns. Both the Government, and the dissenters below, for example, rightly argue that judges sitting now should be most wary of deeming past courts closed to constitutional claims, lest it be too easily argued in the future that those claims cannot be heard at all. *See* Brief for the United States [hereinafter, "Government's Brief"] at 45-49. Likewise, if a limitations period "can be tolled until the defendant *admits* wrongdoing," *id.* at 43 (emphasis in original), the legitimate purposes of a statute of limitations would be defeated.

Although we concur in the Government's concern that courts be deemed open and, for that reason, limitations periods should be properly enforced, we do not believe the Government has shown that these concerns are implicated by the decision below. In particular, we see the Government's brief on the limitations issue to be marred by two central flaws.

First, if it is true, as the Government urges, Government's Brief at 31-37, that the United States did not mislead the Court while defending the evacuation, it is a

serious overstatement to then claim the internees may fairly be held to a duty to have litigated their takings claims prior to Congress's request for an investigation in 1980, *id.* at 45-49. On this score, the Government's argument underrates the military necessity defense, *id.* at 39, overstates the interests protected by the takings clause, *id.* at 48, and misstates not only the narrow takings claims brought by the internees here, *id.* at 40, but also what the court of appeals required as a predicate for the running of the statute, *id.* at 43. It may well be within the realm of reality to argue that a petition for habeas corpus brought by one of the internees challenging, not the evacuation, but the "internment" itself, *id.* at 39 n.33, may have succeeded forty years ago, *id.* at 38-39. But if, as the Solicitor General claims, *Hirabayashi* and *Korematsu* rested solely on inferences drawn from "ancestral, cultural, and ethnic considerations," Brief for the United States at 31, it is a long step indeed to argue that claims for takings incident to the very orders upheld in *Korematsu* had any chance of survival absent some intervening act from the war-making branches.

Second, if the Government is earnest in its claim that this Court in *Hirabayashi* and *Korematsu* did seriously "look at the facts," Brief for the United States at 47, then withheld documents indicating charges of disloyalty were baseless would have been "material" to the Court's decision in the wartime cases. *Id.* at 42. If so, the accrual rule adopted by the court below need not be defended under a rule of equitable tolling, *id.* at 43, or even under a rule of estoppel barring misconduct prejudicing the public. *See Heckler v. Community Health Services*, 467 U.S. 51, 60 (1984). The Government does, we believe, overlook critical facts that were withheld from the Court, and released only recently, that would materially alter a claim challenging any "factual" basis for a military, as opposed to a merely racial, justification for the evacuation. *See Hirabayashi v. United States*, 627 F. Supp. 1445, 1451-52

(W.D. Wash. 1986). But, ultimately, the issue is whether the Judicial Branch is so helpless to protect *itself* in future cases like *Korematsu* that it cannot here require the Government even to defend why it should not be deemed estopped from asserting a time-bar. The matter, simply put, is "the legitimate needs of the judicial process." *United States v. Nixon*, 418 U.S. 683, 707 (1974).

Thus, whether the wartime cases are viewed as a product of a harsh rule of deference, as the Government now claims in defending its conduct in 1944, or as the result of the Court's dependence upon the Government's factual omissions, as the Government believes in arguing it should prevail as if this were a garden variety tolling problem, the Solicitor General's logic still does not support reinstating a Rule 12 dismissal.

## ARGUMENT

### I. IF THE GOVERNMENT DID NOT MISLEAD THIS COURT IN THE WARTIME CASES, THIS COURT'S DECISIONS JUSTIFIED THE RULE OF ACCRUAL APPLIED BELOW TO WARTIME TAKINGS CLAIMS ARISING FROM EXCLUSION PURSUANT TO EXECUTIVE ORDER 9066.

There is no doubt that 28 U.S.C. § 2401(a) "purports on its face to bar a civil suit [under the Tucker Act] 'if the right to bring it first accrued more than six years prior to the date of filing the suit.'" Government's Brief 29 (quoting *Crown Coat Front Co. v. United States*, 386 U.S. 503, 510 (1967)), and that the issue, generally, under § 2401 is whether a plaintiff can "'with honesty, make the necessary allegations to support an action.'" *Id.* (same). The decision of the court of appeals rests on the premise that this rule applies to defenses that would be revealed by the pleadings or matter otherwise noticeable on a Rule 12 motion. *See supra* p. 6. In the main, the Government does not question this premise.

Rather, the Government argues that (1) even though (indeed because) this Court's decisions in *Hirabayashi* and *Korematsu* rested on "the government's wartime position that ancestral, ethnic, and cultural background may give rise to a greater likelihood of subversive activity [by ethnic Japanese]," Government's Brief at 37, (2) it is only "speculative" to say that *Hirabayashi* and *Korematsu* foreclosed *any* takings claim necessarily incidental to the exclusions authorized in *Korematsu*, which rested on the same premise as the curfew upheld in *Hirabayashi*. Government's Brief at 40. If, as the Government urges, the premise of this statement is true, what follows nonetheless is not. This is so for several reasons.

#### A.

We start with what is at stake. In what was then-dictum, the District Court held the internees' claims for violation of their rights of assembly, equal protection, procedural due process, and freedom from cruel and unusual punishment could not be litigated in the guise of claims for just compensation on the notion that "the government 'took' constitutional rights." 586 F. Supp. at 783 (J.A. 131). That ruling is not directly before the Court, but we believe it correct under *United States v. Mitchell*, 463 U.S. at 218. Any redress here (assuming the internees can overcome the remaining problems of law and proof that await them in District Court) will be partial at best, and full relief must lie with Congress.

#### B.

The very limited nature of the right claimed belies the Solicitor General's argument that neither *Hirabayashi* nor *Korematsu* justified the lower court's rule of accrual (Government's Brief 40). The gist of the Solicitor General's argument is that because *Hirabayashi* and *Korematsu* embodied "carefully limited rulings," *id.* 38, the courts should



have been deemed amenable to the internees' takings claims many years ago. As a result, the internees may fairly be deemed to have forfeited such claims. The central flaw in this logic is that it simply conflates the liberty interests and substantive freedoms that moved the Court to set limits on its holdings (and which might have given hope for vindication of those rights), with the manner in which the wartime cases blocked the instant claims.

Thus, we acknowledge at the outset that the Court's wartime decisions, *Hirabayashi* and *Korematsu* notwithstanding, did not sanction a wholesale abolition of the formal means to litigate civil disputes, see *Ex parte Kawato*, 317 U.S. 69, 78 (1942), or criminal liability, see *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). These holdings bear witness to the Court's commitment to basic liberties and foreshadow today's rules that, for example, presume a state's criminal courts amenable to "'an opportunity' to reconsider previously rejected constitutional claims," *Smith v. Murray*, 106 S. Ct. 2661, 2666 (1986), or deem a state's regulatory agencies open to any "meaningful application" permitting the agency to obviate a taking claim by allowing "a reasonable return" on a landowner's property, *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2567, 2568 n.8 (1986). But the fact that the wartime court entertained, and in some instances granted on statutory grounds, petitions for *habeas corpus* challenging the internment itself, see *Ex parte Endo*, 323 U.S. 283 (1944), does not capture the obstacles facing the internees on the claims here, particularly given the Government's view of the wartime cases.

1. The Government seriously undercounts the impact of the military necessity defense to wartime takings claims in general. But see J.A. 38-39 (argument in court of appeals that military necessity defense operates on the pleadings); 133 & n.20 (same claim in district court). Contrary to the Government's brief, the defense does not apply just to situations in which "property is destroyed 'by the opera-

tions of armies in the field' . . . in order 'to prevent the enemy from using it.' " Government's Brief at 39 (citations omitted). It also applies to "measures necessary for the[] safety and efficiency [of the armed forces]" so long as the property is not taken for the military's own use. See *United States v. Pacific Railroad*, 120 U.S. at 239; cf. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3 (1949) (taking when military took "immediate possession" for "use by the Army"); *United States v. Russell*, 80 U.S. (13 Wall.) 623, 629 (1871) (compensation if military makes "use of the property"). The rule fits well within the principles for determining when a taking exists. In the midst of war, there simply is no reasonable investment-backed expectation against destruction of property caused by "operations of armies in the field, or by measures necessary for their safety and efficiency," *Pacific Railroad*, 120 U.S. at 239. Nor is the "'character of the governmental action,'" *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2556 (1986), sufficient to justify compensation. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 431-32 (1982) (wartime takings cases).

The military necessity defense to takings claims also rests upon the separation of powers concerns that animate the law of sovereign immunity itself. Those principles, as reflected, for example, in the immunity for performance of discretionary functions, 28 U.S.C. § 2680(a) (1982), embody a judgment that officials should not be hindered in their actions that require exercise of "policy judgment" or obedience to "official directions" by the risk of subjecting the Government to damages if they are wrong. *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953), quoted, *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 811 (1984). Exempting certain actions intended to protect the safety of troops or materiele from takings claims serves similar purposes.

Given the force that is properly attributable to the military necessity defense, and which we believe the United States would assert in cases implicating military necessity, the claim that "*Hirabayashi* and *Korematsu* did not foreclose a[ny] Takings Clause claim[.]" Government's Brief at 40, is not persuasive. The entire thrust of the wartime cases was that curfews and evacuation were needed for the "safety and efficiency of armies in the field." Thus, in *Korematsu*, the Court reaffirmed that the curfew and exclusion orders "were aimed at the twin dangers of espionage and sabotage," 323 U.S. at 217, and that, "when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger." *Id.* at 220.

2. The Government's claim that the evacuees faced no serious obstacles to litigating takings claims is not supported by the supposedly narrow holdings in *Korematsu* and *Hirabayashi*. It is of course true, indeed the Respondents' entire theory rests on the proposition that, the military necessity defense can be defeated upon a proper showing of a complete absence of military necessity. But on the Government's own view of the wartime cases, this ground for overcoming the defense was squarely ruled upon and rejected in *Hirabayashi* and *Korematsu*, and on evidentiary grounds that were anything but "careful" and "limited." Indeed, to escape charges of concealment, the Government urges that those decisions *were* based on the Court's deference to "the government's wartime position that ancestral, ethnic, and cultural background may give rise to a greater likelihood of subversive activity." Government's Brief at 37. That "position" was employed not merely to infringe on property rights, but, in *Hirabayashi*, to justify house arrest, and, in *Korematsu*, banishment. Deprivations so disdainful that they are void even if the Government offers compensation, *see Williamson County*, 105 S. Ct. at 3125 n.1 (Stevens, J., concurring), were thus

affirmed on the "controversial" notion that ancestry was a valid proxy for loyalty. Government's Brief at 37.

3. Although the Government asserts *Hirabayashi* and *Korematsu* left open takings claims because "taking of property was not part and parcel of the evacuation," Government's Brief at 39 n. 33, and the military "disclaimed the necessity for, and made provisions (albeit inadequate) to avoid, takings of property," *id.* at 40, these arguments are not apt at this stage, or are, at best, incomplete. Whether the Government's programs actually caused a taking is a factual matter not properly subject to resolution on a Rule 12 motion, where the Court must "take the well-pleaded factual allegations of the complaint as true." *Papasan v. Allain*, 106 S. Ct. at 2943 (citing cases).<sup>9</sup> Indeed, the Government's Petition assumes the internees' have stated the *prima facie* elements of *some* takings claims; it also assumes that, if, contrary to the Government's view, execution of the orders sanctioned by *Ko-*

<sup>9</sup> Of course, on a Rule 12 motion the Court is not required to accept as true "a legal conclusion couched as a factual allegation." *Papasan*, 106 S. Ct. at 2944. And there is strong support for the claim that "[a]ccidental, unintended injuries inflicted by governmental actors are treated as torts, not takings." *In re Chicago Milwaukee, St. Paul and Pacific RR.*, 799 F.2d 317, 326 (7th Cir. 1986) (Easterbrook, J.).

What the internees may be claiming, in addition to a temporary taking of their right to occupy their homes, *cf. Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S. Ct. 3108, 3126 (1985) (Stevens, J., concurring), is not just that their property was sold to others at distress prices because of federal negligence, but that there was no purpose whatever, except as a vent to racially-motivated interests, for the government's actions under the exclusion orders. Hence, the internees may have a claim that property losses sanctioned by *Korematsu* were not just an "accident," but a "taking" for a "private" use that a fortiori demands compensation. *See Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981). *Compare Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (rational basis review for finding public use in takings cases), with *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) (racial discrimination not rational).



*rematsu* caused *any* taking (and § 2401 does not otherwise control), the case should be remanded. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Government did not (and could not) fairly brief in fifty pages the many substantive takings issues that may be implicated by the evacuation, and we urge the Court to allow the lower courts to resolve these issues.

### C.

If, as we have shown, the military necessity defense facially applied to takings claims incident to the evacuation, if, as the Government urges, no evidence of "specific conduct alleged to be indicative of past or planned subversive activity" bore on the decisions in *Hirabayashi* and *Korematsu*, and if, as the Court must assume, the orders sanctioned in *Hirabayashi* and *Korematsu* necessarily caused some takings, then the court of appeals' decision was neither "unprecedented," nor "created out of whole cloth." Government's Brief at 43, 46. Under these circumstances, the internees simply could not "with honesty, make the necessary allegations to support an action." *Crown Coat Front Co.*, 386 U.S. at 515. Although the Government takes issue with the language of the panel opinion, "this Court reviews judgments, not opinions." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). Because the judgment did not extend the sovereign's waiver "beyond that which Congress intended[.]" *Block v. North Dakota*, 461 U.S. 273, 287 (1983) (citation omitted), it should be affirmed.

1. The Government claims that the decision below tolled the limitations period "until the defendant *admits* wrongdoing." Government's Brief at 43. The panel decision did not do so. In fact, the panel explicitly held that "Public Law 96-317, standing alone, could not produce a legal victory for any former evacuee who brought a claim" (J.A. 61 n.68). The panel did say that President Ford's 1976 proclamation repealing Executive Order 9066 as a "mis-

take" was not a "suggestion" of "legal error" that could start the statute (J.A. 60 n.67). But, even if it was, it was appropriate for the Respondents to await indication from Congress as well, just as this Court based its wartime rulings on the concurrence of the political branches.

The requirement of a "suggestion" of "legal error" was consistent with *United States v. Kubrick*, 444 U.S. 111 (1979), where the Court held that the statute begins to run in a malpractice case when a plaintiff "has discovered both his injury and its cause." *Id.* at 120. When those facts are available in such cases, "[t]he prospect is not so bleak" that a diligent plaintiff with a valid claim will be unable to develop his case. *Id.* at 122. Under *Hirabayashi* and *Korematsu*, the evacuees did not suffer *any* "constitutional injury," *City of Los Angeles v. Heller*, 106 S. Ct. 1571, 1573 (1986), much less a mere uncompensated taking. Nor, under the Government's view, would any facts within even the Government's control have changed the outcomes in the war cases. Government's Brief at 36-37. In this context, the lower court's ruling that "suggestion" of "legal error" started the statute did no more than place the evacuees in the position of a malpractice victim who knows of his "injury and its cause." The Government was not served up "on a silver platter" (J.A. 61 n.68).

2. Nor did the lower court simply "capitulat[e] to the political branches." Government's Brief at 46. The court made no suggestion that in future cases of unreviewed wartime action, see *United States v. Caltex*, 344 U.S. 149 (1952), a "suggestion" of "legal error" from the political branches would be necessary to give rise to a takings claim. Had the Court heeded Justice Jackson's plea in *Korematsu* to abstain from "rationaliz[ing] the Constitution to show that the Constitution sanctions such an [exclusion] order," 323 U.S. at 246, the instant claims would have been in the same posture as those in *Caltex*. Review of any takings challenge would be appropriate within six years of the events at issue, and properly barred thereafter.

3. The real issue, as the Solicitor General implicitly acknowledges, is whether the formal availability of Tucker Act jurisdiction in the 1950s, 1960s, and 1970s, and this Court's residual power to overrule its wartime decisions, suffices to impose on the evacuees a procedural forfeiture of takings claims facially barred by *Hirabayashi* and *Korematsu*, and, under the Government's view, as to which reference to evidence of disloyalty was unnecessary to a finding of military necessity. The issue is close, but we believe Respondents should prevail.

First, it should not be forgotten that a statute of limitations is, after all, a statute, and that the ultimate source of its meaning should be Congress's intent. *Block v. North Dakota*, 463 U.S. 273, 287-88 (1983); see *id.* at 299 (O'Connor, J., dissenting). The maxim that conditions on a waiver of sovereign immunity "must be strictly observed," *id.* at 287, goes hand in hand with the rule that the Court may not "narrow the waiver that Congress intended." *United States v. Kubrick*, 444 U.S. 111, 118 (1980). This Court has made clear that given the broad range of circumstances in which takings claims may be asserted, "procedural rigidities should be avoided" in light of "the danger of determining rights based upon definitions of a 'cause of action' unrelated to the function which the concept serves in a particular situation." *United States v. Dickinson*, 331 U.S. 745, 748-49 (1947), cited, *Yolo County*, 106 S. Ct. at 2567 n.7. Because when Congress waives sovereign immunity, it may not subject litigants to "unfair procedures," *Yolo County*, *supra*, Congress must fairly be deemed not to intend premature termination of claims. See *Kent v. Dulles*, 357 U.S. 116, 130 (1958). It is not enough for the Solicitor General to imply that imposition of a time bar would not amount to a deprivation without due process of law.

The implicit premise of the Government's argument, that the court of claims should be deemed to have been receptive to Respondents' takings claims, would, we submit,

have substantial merit if *Hirabayashi* and *Korematsu* were lower court decisions. Cf. *Smith v. Murray*, 106 S. Ct. 2661, 2667 (1986); *Murray v. Carrier*, 106 S. Ct. 2639, 2645 (1986). But as the Court noted in *Reed v. Ross*, 468 U.S. 1 (1984), if there is ever a situation in which an attorney lacks "a 'reasonable basis' upon which to develop a legal theory[.]" it is when that theory requires that this Court "explicitly overrule one of [its] precedents," *id.* at 17, and then give the new rule "retroactive application." *Id.*

Here the evacuees do not seek a "potentially 'limitless extension of the period of limitation[.]'" Government's Brief at 44, but rather some indication from the political branches, on whose "wartime positions" this Court rested its decisions, providing a principled basis for claiming in the courts below that *Korematsu* should not be deemed good law. See *Thurston Motor Lines v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam); cf. *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734 (7th Cir. 1986) (Posner, J.). It is one thing to note that *Plessy v. Ferguson*<sup>10</sup> was overruled. It is quite another to say that *Brown v. Board of Education*<sup>11</sup> had to be brought in 1902. On these unique facts, Congress should not be deemed to have foreclosed Tucker Act jurisdiction. See *United States v. Dickinson*, *supra*; cf. *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982) (forfeitures may be exacted only on failures "to take reasonable actions imposed by law").

<sup>10</sup> 163 U.S. 537 (1896).

<sup>11</sup> 347 U.S. 583 (1954). In response to Chief Judge Markey's suggestion that Respondents should have filed their claims, taken the inevitable loss, and then applied for Rule 60(b) relief, we point out that Rule 60(b)(2) imposes a one-year limitation on motions based on newly-discovered evidence. The Government, it should be noted, does not rely on this theory.



## II. IF THE GOVERNMENT DID MISLEAD THIS COURT IN THE WARTIME CASES, THE COURT BELOW CORRECTLY REINSTATED THE EVACUEES' TAKINGS CLAIMS.

As the Court stated in *United States v. Young*, 470 U.S. 1 (1985), "[t]he line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone." *Id.* at 7. Nonetheless, if, as the Government contends, the wartime Court truly wished "to look at the facts," Government's Brief at 47, the claim that "[t]he government did not mislead this Court," *id.* at 31, should not be credited. On a matter as weighty as the first post-Civil War attempt by the Government to have this Court ratify a facially discriminatory racial measure, the Government's duty of candor to this Court was at its height. As the Solicitor General to his credit recognizes, the issue is remedy. *Id.* at 41. Contrary to the Solicitor General's view, we concur with the evacuees that evidence material to their right of action for compensation was not reasonably found until as recently as 1981. See *Hirabayashi v. United States*, 627 F. Supp. 1445, 1455 (W.D. Wash. 1986). But even if all of the "relevant facts" were available "no later than 1950," there is a very substantial argument that, on the claims here, the court below rightly estopped the Government from asserting a time-bar.

### A.

If facts specifically "indicative of past or planned subversive activity," Government's Brief at 32, would have been relevant to the issues on review in *Hirabayashi* and *Korematsu*, it should not be said, even in hindsight, that the duties of those who defended the curfews and evacuations before this Court properly were discharged by their refusal to endorse statements of fact known to be false. See Government's Brief at 33. In a broad variety of settings, it is incumbent to disclose information as well as

to refrain from falsehoods. See *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448 (1976). And if "a special duty to be meticulously forthright" falls upon anyone, it falls upon those of us who are members of "a favored class of litigants." *Superintendent, Massachusetts Correctional Institution v. Hill*, 472 U.S. 445, 457-58 (1985) (Stevens, J., concurring in part and dissenting in part).

Nor, on the view that the wartime Court was concerned with "the facts," could it be said that matters arguably withheld by the Government were immaterial. As demonstrated by *Hunter v. Underwood*, 471 U.S. 222 (1985), "[p]roving the motivation behind official action is often a problematic undertaking." *Id.* at 228. If, as in *Hunter*, a wide array of matter may be called on to show that a facially neutral statute is backed by racial animus, see *id.* at 228-29, then, surely, when the Government seeks to uphold laws that on their face classify by race, as did those in *Hirabayashi* and *Korematsu*, it is (and was) relevant that the reasons advanced for the laws are without factual support, or a pretext for improper goals. Cf. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

### B.

Thus, if facts mattered, the statement that the Government "did not mislead this Court" is incomplete. That the published *Final Report* of General DeWitt, who was most responsible for the curfew and evacuation orders, if not the entire internment program, was specifically impeached by intelligence reports by the Director of the F.B.I., the F.C.C., and the Office of Naval Intelligence, surely would be relevant to an inquiry into racial animus. The Government admits it withheld those intelligence reports from the Court. Government's Brief 31-33.

Having done so, the Solicitor General pleads avoidance on the ground that the contraindicating intelligence reports were available in the 1950s, and thus even if § 2401 was

tollled, it was not long enough to allow the evacuees into court. But as the public record suggests, it was not until 1981 (J.A. 339), that researchers for the Commission uncovered evidence such as the destruction of copies of a first version of the *Final Report* (J.A. 344), admissions by General DeWitt indicating the *Final Report* was knowingly false (J.A. 345), and language in the original version of the report in which DeWitt explicitly rejected the Government's proffered reason for the evacuations—that there was insufficient time to separate the loyal from the disloyal. See *Hirabayashi v. United States*, 627 F. Supp. 1445, 1452 (W.D. Wash. 1986). As the 1986 *Hirabayashi* decision shows, it is *this* concealed evidence that goes to “‘the very essence of the [evacuees'] right of action,’ ” Government's Brief at 41 n.35, that is, the evacuees' claim that the military's proffered reason for evacuation was a pretext for discrimination. See 627 F. Supp. at 1452. If, as the Government urges, facts concerning the military's true reasons and motives would have been material to the war-time Court, under settled law the claims were timely filed.

### C.

Even if everything the Government argues on limitations is correct, there is still a substantial claim that the United States should be estopped to assert the statute. Cf. *Honda v. Clark*, 386 U.S. 484, 500 (1967) (reserving whether estoppel can be asserted as against a time-bar defense). Although the most recently uncovered evidence of racial animus was not available to the Justice Department when the briefs in *Korematsu* were prepared, see *Hirabayashi*, 627 F. Supp. at 1454, as we have shown, and as Respondents will amplify, at least some critical evidence undermining the basis for the evacuation program was withheld, not just from the public and the evacuees, but from this Court as it made its historic, and as history has shown, unfortunate decisions. This is thus not an ordinary case involving tolling of a limitations period, see

*Holmberg v. Armbrrecht*, 327 U.S. 392 (1946), or imposition of an estoppel to bar enforcement of the law, see *Lyng v. Payne*, 106 S. Ct. 2333, 2340 (1986). Rather, viewing the complaint and the public record in the manner most favorable to the evacuees, the case implicates “the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions.” *United States v. Nixon*, 418 U.S. 683, 707 (1974). If, as the Government contends, the war-time Court should be deemed to have been interested in specific facts, the evacuees have a substantial claim that a wrong was committed not just against them, but also “against the institutions set up to protect and safeguard the public.” *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 246 (1944). Thus, even if the decision below was “a ticket good on this day and train only,” Government's Brief at 43, we respectfully contend it was properly issued nonetheless.

### CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.



Respectfully submitted,

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**AMICUS CURIAE**

**BRIEF**



8  
No. 86-510

Supreme Court, U.S.  
**FILED**

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CLERK

In The  
**Supreme Court of the United States**

October Term, 1986

— o —  
THE UNITED STATES OF AMERICA,

*Petitioner,*

v.

WILLIAM HOHRI, *et al.*,

*Respondents.*

— o —  
**AMICI CURIAE BRIEF OF THE  
AMERICAN FRIENDS SERVICE COMMITTEE,  
THE BOARD OF CHURCH AND SOCIETY OF  
THE UNITED METHODIST CHURCH,  
THE UNITED CHURCH BOARD FOR  
HOMELAND MINISTRIES OF THE  
UNITED CHURCH OF CHRIST, AND  
THE AMERICAN JEWISH COMMITTEE  
IN SUPPORT OF RESPONDENTS**

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## INTEREST OF AMICI

The American Friends Service Committee (AFSC) has been active since 1917 on behalf of the several branches of the Religious Society of Friends in works of humanitarian relief and service, reconciliation among nations and peoples, and programs to overcome discrimination and oppression. As part of its commitment to racial equality and social justice, in 1942 AFSC actively opposed the exclusion and imprisonment of people of Japanese ancestry on the West Coast.<sup>1</sup> AFSC provided assistance to the internees in the camps, including efforts to continue the education of those of college age, and aided in finding housing and employment for Japanese American families after the camps closed. In 1981, AFSC endorsed individual monetary redress for those who had been imprisoned.

The Board of Church and Society of the United Methodist Church is a non-profit corporation charged by the Church's policy-making body, the General Conference, with the responsibility for implementation of social concerns policy statements. At its 1980 meeting, the General Conference adopted a resolution concerning the Americans of Japanese ancestry imprisoned in camps during World War II that "acknowledges the flagrant violations of human rights and affirms the need for the United States of America [to provide] redress."

The United Church Board for Homeland Ministries is a not-for-profit corporation charged with the planning

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<sup>1</sup>A copy of AFSC's 1942 public statement "The Japanese Evacuation" is attached as an appendix to amici's brief in support of respondents' cross-petition for certiorari in this matter, *Hohri, et al. v. U.S.*, No. 86-298.

and conduct of the homeland mission of the United Church of Christ. One of its responsibilities is to continue the work begun by the American Missionary Association, established in 1846 to abolish slavery and all forms of caste. Based upon resolutions of the 13th and 14th General Synods of the United Church of Christ in 1981 and 1983, the United Church Board for Homeland Ministries has given leadership in promoting justice for Japanese-Americans and in seeking the development of an open, pluralistic and democratic society in the United States, believing that both require redress for Japanese-Americans imprisoned during World War II.

The American Jewish Committee is a national organization founded in 1906 to protect and secure the civil and religious rights of Jews and persons of all faiths, races, and ethnic backgrounds. The American Jewish Committee views the exclusion and imprisonment of Americans of Japanese ancestry, based solely on their race, as a national disgrace, and believes the persons harmed should receive monetary redress.

Letters from the parties consenting to the filing of this amici curiae brief have been filed with the Clerk.

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### SUMMARY OF ARGUMENT

Amici urge affirmance of the court of appeals and suggest an alternative, but not inconsistent, analysis of the statute of limitations issue. While the victims of the exclusion and imprisonment of persons of Japanese ancestry

knew the nature of their claims when they were excluded and imprisoned, they reasonably and correctly viewed those claims as legally foreclosed by this Court's decisions until it was revealed, in the early 1980s, that those decisions rested on the government's deliberate deception of this Court.

---

### ARGUMENT

A deliberate deception of this Court by the military and the Justice Department in the 1940s resulted in the Court's approval of the imprisonment of a race of Americans. Amici believe the legal, societal and human impact and importance of this deception of the Court and the nation has somehow been obfuscated or lost, particularly in the government's briefs aimed at avoiding any review of *Korematsu v. United States*, 323 U.S. 214 (1944), *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Yasui v. United States*, 320 U.S. 115 (1943), and avoiding any redress for 120,000 people imprisoned solely because of their race. Amici urge the Court to affirm the decision of the court of appeals upholding its appellate jurisdiction and tolling the statute of limitations. In addition, we suggest here an alternative, but not inconsistent, framework regarding the statute of limitations issue that focuses on the deliberate fraud perpetrated by the executive branch.

We start by recognizing that the victims of the exclusion and imprisonment knew the nature of their claims and the identities of the wrongdoers at the time they were excluded from the West Coast and imprisoned. They knew they and other persons of Japanese ancestry were not a



danger to the United States, and they disagreed with the government's hysterical assertions to the contrary. See Hohri Affidavit, J.A. 347-51. In this sense, there was no hidden claim.

Rather, the members of the plaintiff class in this case believed the substance of their claims was considered and *definitively rejected* by this Court in *Korematsu*, *Hirabayashi* and *Yasui*. To Plaintiff William Hohri,

the Supreme Court decisions in *Korematsu*, *Hirabayashi*, and *Yasui* were written in stone, immutably validating the United States wartime actions and depriving us of any legal remedies for the massive injuries inflicted on us. These rulings devastated our faith in the American legal system and made a folly of our supposed Constitutional rights as citizens, for we learned that Japanese Americans had no rights. Only in the past year or two [the early 1980s], with the discovery of heretofore undisclosed government documents, has evidence been available that the United States knew what it was doing to us, knew that there was no basis for imprisoning us, and intentionally continued to cover up this information. Hohri Affidavit, J.A. 348.

In this regard, the plaintiffs had the same understanding as Congress, the courts, and any reasonable attorney: any claim based on allegations that the exclusion and imprisonment were not necessary—in other words, any claim that challenged the government's military necessity justification—was legally foreclosed, since this claim was specifically considered and rejected by the Supreme Court. See *Claim of Mary Sogawa*, 1 Adjudications of the Attorney General 126 (December 20, 1950); H.R. Rep. No. 732, 80th Cong., 1st Sess. (1947); S. Rep. No. 601, 82d Cong., 1st Sess. 2 (1951); H.R. Rep. No. 496, 82d Cong., 1st Sess.

2 (1951); H.R. Rep. No. 1809, 84th Cong., 2d Sess. 3 (1956); Opinion of the Court of Appeals, J.A. 28-31 (*Korematsu* “effectively barred claims for compensation”). Indeed, in *Korematsu* the Court said:

[W]e cannot reject as unfounded the judgment of the military and of Congress that there were disloyal members of that population, whose number and strength could not be easily and quickly ascertained. We cannot say that the war-making branches of Government did not have ground for believing that in a critical hour such persons could not be readily and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard it. 323 U.S. at 218 (quoting *Hirabayashi*, 320 U.S. at 99).

Thus, an alternative framework for analyzing the tolling issue is provided by cases in which a plaintiff fails to bring suit within the period of the statute of limitations because the claim is reasonably and correctly believed to be foreclosed by collateral estoppel or a definitive rejection of the same factual and legal contentions in an earlier case, and then files suit after discovering previously concealed evidence that the earlier decision resulted from a deliberate deception of the court by the defendant.

Although this series of events is quite unusual, this Court has previously considered the issue in an opinion by the author of the *Korematsu* decision, Justice Hugo Black. In *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), plaintiff in a patent case challenged a decision adjudicated and entered nine years earlier on the ground that defendant had deliberately and materially deceived the court. Defendant had written an article praising the

utility and uniqueness of the patented process, had it deceptively published as if written by a labor leader in the field, and then emphasized the article in its brief urging that the patent was valid and had been infringed by plaintiff. The circuit court in this earlier proceeding referred to this article in its ruling in favor of defendant. Plaintiff in *Hazel-Atlas* sought to challenge the earlier ruling after discovering the spurious origins and authorship of the article.

This Court found that there was "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals" and granted relief since the article "impress[ed] the Court," "whether or not it was the primary basis" for the earlier decision. 322 U.S. at 245-6. The Court reasoned that

tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud. 322 U.S. at 246.

See also *Standard Oil Co. v. United States*, 429 U.S. 17 (1976) (per curiam).

There can be no doubt that the central, primary basis of this Court's decisions approving the exclusion and imprisonment of persons of Japanese ancestry was its con-

sidered deference to what the Court regarded as a good faith claim of military necessity.<sup>2</sup> Had the Court disbelieved that claim or known it to be made in bad faith, the result would clearly have been different.

Thus, the crucial concealed evidence, in this alternative analysis, must demonstrate that the military's representation of military necessity was itself made deceptively and in bad faith.<sup>3</sup> The discovery of withheld evidence contrary to the military's assertion of military necessity would be by itself insufficient, as the military could have been aware of contradictory evidence and yet still have concluded, in good

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<sup>2</sup>The government's claim to the contrary is simply inconsistent with the language of *Korematsu* and *Hirabayashi*. See Government Brief, at 31-37. Both opinions make it abundantly clear that the military's conclusion that the exclusion and imprisonment were necessary was the crucial factor in upholding what would otherwise have been manifest constitutional violations. See e.g. *Hirabayashi*, 320 U.S. at 93 ("[I]t is not for any court to sit in review of the wisdom of [the military's] action or substitute its judgment for theirs"); *Korematsu*, 323 U.S. at 218. The underlying assumption of the good faith of the military was also stated explicitly by Justices Douglas and Murphy in their separate concurring opinions in *Hirabayashi*. Justice Murphy was reassured that "it is not to be doubted that the action taken by the military commander in pursuance of the authority conferred upon him was taken in complete good faith and in the firm conviction that it was required by considerations of public safety and military security." 323 U.S. at 109; see also *id.* at 106 (Douglas, J., concurring). Note that the Court's deference to the military need not even have been total; as *Hazel-Atlas* makes clear, the fraud on the court need only have affected its decision to some extent to render the entire holding suspect.

<sup>3</sup>Similarly, in other areas of law, absence of good faith is grounds for not deferring to a co-equal branch even where deference would otherwise be absolute. See e.g. *Local 2855, AFGE v. U.S.*, 602 F.2d 574, 580 (3d Cir. 1979); *Curran v. Laird*, 420 F.2d 122, 131 (D.C. Cir. 1969).



faith, that national security required the exclusion and imprisonment. Only the discovery of concealed evidence demonstrating that the Court's good faith reliance on the military was misplaced, and that the military and executive branch had deliberately deceived the Court, could rebut the presumptive validity of the Court's earlier decisions.

Therefore, discovery of new evidence in the government's possession at the time of the exclusion, the pronouncement of a president that he wished we knew then what we know now, and the establishment by Congress of a commission to investigate the military necessity claim are not as important as one other development—the revelation in the early 1980's by Congress' commission and a professor of political science that, according to previously secret government documents, the government itself knew the military necessity argument was fabricated and false, that evidence of this knowledge was deliberately hidden and in some cases destroyed, and that the government deliberately and in bad faith deceived this Court and the American people. See *Personal Justice Denied, Report of the Commission on Wartime Relocation and Internship of Civilians* (1982); P. Irons, *Justice at War* (1983).

The Complaint in this case (J.A. 157-215) was filed within a year or two of these revelations, and they comprise the basic thrust of its allegations.<sup>4</sup> The point is emphasized right at the beginning:

3. The Commission concludes that defendant's treatment of the plaintiff class "was not justified by military necessity," and that the imprisonment and con-

<sup>4</sup>See particularly Complaint, ¶¶ 3-4, 50, 55-60, 73, 87, 93-99, 107, 109-110 (J.A. 161-206).

tinued exclusion of plaintiffs from the West Coast of the United States "were not driven by analysis of military factors." Rather, these wartime deprivations were caused by "race prejudice, war hysteria, and a failure of political leadership." *Personal Justice Denied*, p. 18.

4. Recently obtained evidence also demonstrates, as hereinafter alleged, that at the time of these actions responsible United States officials *knew* their actions were in direct contradiction to authoritative intelligence reports already in defendant's possession attesting to the loyalty of the plaintiff class and the absence of any need to subject them to mass deprivation of their civil rights. Complaint, ¶¶ 3-4 (J.A. 161) (emphasis in original).

Specific deliberate acts of deception are alleged, often with citations to and quotes from the recently revealed government documents. Plaintiffs alleged that the executive branch withheld intelligence reports and studies that concluded there was no danger; that repudiated specific claims of subversion by persons of Japanese ancestry raised in bad faith to justify the exclusion and imprisonment, such as the false claim that the Japanese military was signaled or radioed from the West Coast; and that specifically admitted that there was no military justification. Complaint, ¶¶ 50, 55-58, 87 (J.A. 181-97). All copies of the original "Final Report" of the War Department were burned because they showed the real motivation for the exclusion and imprisonment was not military but racist. Complaint, ¶ 97 (J.A. 201-2).

The allegations of deliberate acts of deception include purposeful misrepresentations made to this Court. The government "intentionally and capriciously raised false claims in briefs filed in the United States Supreme Court,

as well as in lower federal courts, for the purpose of shielding its illegal acts from judicial scrutiny." Complaint, ¶ 93 (J.A. 199-200). In *Hirabayashi*, the Solicitor General was warned, in a written memorandum from the Justice Department official most knowledgeable about the matter, that the military necessity claim was false and that he had a duty to bring the true facts to the Court's attention. Complaint, ¶ 94 (J.A. 200). Instead, evidence contradicting the military necessity claim was excluded from the record "in bad faith," and "false representations [were made] that disclosure of this evidence would jeopardize national security interests." Complaint, ¶ 95 (J.A. 200-201). In *Korematsu*, Justice Department attorneys proposed to insert a footnote in the government's brief that warned the Court not to take judicial notice of facts in the Final Report because these facts contradicted "evidence known to and views held by DOJ." The warning was deleted "in bad faith." Complaint, ¶ 98 (J.A. 202).

Finally, the Complaint alleges that "as a result of defendant's aforesaid misrepresentation and suppression of evidence, which representations the Supreme Court relied on in whole, the Supreme Court issued decisions upholding criminal convictions of persons who challenged the mass curfew and exclusion orders." Complaint, ¶ 99 (J.A. 202).

Thus, the Complaint alleges, with unusual specificity and documentation, that the Court was deliberately and materially deceived by the government's bad faith assertions of military necessity. These allegations would be shocking in any case; they raise issues of integrity that are difficult to confront, particularly when the stakes are the imprisonment of 120,000 Americans on the basis of race. Nevertheless, this motion to dismiss should rest, as in all

other cases, on the issues and allegations fairly raised by the Complaint. The revelation of the critical, previously concealed facts and evidence alleged in the Complaint came in the early 1980's, only a year or two before this suit was filed, and provided the factual basis for this action.

Amici urge the Court to affirm the decision of the court of appeals on the grounds stated in the opinion and the alternative grounds suggested here. The deception of this Court by the military and the Justice Department resulted in the Court's approval of the imprisonment of a race of Americans, but it also constitutes a traditionally recognized basis for reviewing that approval even after the passage of over 40 years. Henceforth, the disturbing presence of this Court's most disreputable and dangerous precedents in modern times—if they are not reexamined in this case—cannot be dismissed or ignored as from another era.

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## CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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**AMICUS CURIAE**

**BRIEF**

FEB 17 1987

JOSEPH F. SPANIO, JR.  
CLERK

No. 86-510

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,  
*Petitioner,*

vs.

WILLIAM HOHRI, et al.,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICI CURIAE OF THE  
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ACLU OF SOUTHERN CALIFORNIA,  
ACLU OF THE NATIONAL CAPITOL AREA  
AND AMERICAN JEWISH CONGRESS  
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### QUESTION PRESENTED

Did the government's purposeful concealment of crucial information indicating that the government knew that its previous claim of "military necessity" to this Court in Korematsu v. United States was false toll the statute of limitations until this information was discovered by Plaintiffs within six years of the filing of this action?



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## INTEREST OF AMICI CURIAE<sup>1</sup>

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members. The ACLU is dedicated to preserving and protecting the rights secured by the Constitution. Since its inception, the ACLU has participated in litigation to safeguard and to implement the guarantees of the Bill of Rights. The ACLU of Southern California and the ACLU of the National Capital Area are affiliates of the ACLU. For more than forty years, the ACLU has been involved in litigation and other activities relating to seeking redress for persons of Japanese ancestry who were subjected to internment orders.

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<sup>1</sup>The parties' letters of consent to filing of this brief have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.



The American Jewish Congress (AJCongress) is a nationwide membership organization of American Jews dedicated to protecting the religious, civil, political and economic rights of Jews and other minorities, and to promoting American democratic principles. AJCongress has frequently authorized its members to testify before the United States Congress, various state legislatures and other administrative bodies on matters of concern to the organization. In addition, acting principally through its Commission on Law and Social Action, AJCongress has participated in significant litigation of concern to the entire Jewish community and has appeared as amicus curiae in briefs filed with numerous state and federal courts, including this Court.

Throughout its history, a prime goal

of AJCongress has been the preservation and extension of civil and constitutional rights and the condemnation of discrimination based on xenophobia or bigotry. This historic mission, and the vivid memories of baseless anti-Semitic acts committed against Jews throughout the centuries, prompts AJCongress to participate in this landmark action and to thereby acknowledge the commonality of experience shared by the Japanese-American and Jewish communities.

## STATEMENT OF THE CASE

The internment of tens of thousands of persons of Japanese ancestry during World War II was a national tragedy. Though the dimensions of our government's violations of the rights of those interned is unparalleled, amici contend that ordinary principles of fraudulent concealment apply to toll the statute of limitations applicable to the Plaintiffs' claims for redress in these extraordinary circumstances.

In the early 1940's, United States Army Lieutenant General John L. DeWitt, the Commanding General of the Western Defense Command, unilaterally determined that the presence of United States citizens of Japanese ancestry on American soil constituted a grave threat to national security. This claim of "military necessity" was based on racial

bigotry and was contrary to the evidence available to the government on this subject. The government's claim of "military necessity" was the foundation of this Court's decisions in Korematsu v. United States, 323 U.S. 214 (1944) and Hirabayashi v. United States, 320 U.S. 81 (1943).

In these cases, the War Department purposefully concealed from this Court the fact that all of the studies conducted by the FBI, FCC and Naval Intelligence contradicted DeWitt's unfounded conclusions.

These acts of concealment by the War Department were not discovered until 1981. In that year, Professor Peter Irons, while conducting research for a book, uncovered the previously concealed information detailing the conspiracy within the Executive Branch to defraud



this Court. See generally, Affidavit of Peter Irons, JA 300-308; P. Irons, Justice At War (1983); Personal Justice Denied, Report of the Commission On Wartime Relocation and Internment of Civilians, (1982). See also, Korematsu v. United States, 584 F.Supp. 1406, 1420 (N.D.Cal. 1984) (government's withholding of crucial information and misleading the Court about the accuracy of DeWitt's report results in a "judicial process ... seriously impaired (because) the government's law enforcement officers violate their ethical obligations to the Court").

These acts of concealment were not limited to the wartime period. Rather, the government continued to conceal its deception after Professor Irons requested the memoranda which detailed the government's concealment of critical

information from this Court. The government initially denied the existence of these materials. The truth would not have been discovered, and the critical documents not released, if Professor Irons had not maintained his pursuit of these materials. Hirabayashi v. United States, 627 F.Supp. 1445 (W.D. Wash. 1986) (evidentiary hearing), appeal pending No. 86-3853, (9th Cir. 1986) See Affidavit of Peter Irons, J.A. 300-308.

The evidence of a conspiracy to deceive this Court is clear. General DeWitt's later version of the Final Recommendation of the Commanding General, Western Defense Command and Fourth Army, to the Secretary of War, (Feb. 14, 1942) (hereinafter "Final Report") which asserted an unequivocal "military necessity" to intern and relocate the

innocent Japanese-Americans was proven unsubstantiated in its entirety. Moreover, the original version of General DeWitt's Final Report was not made available to the Justice Department when it prepared its arguments to this Court. That version revealed the true reason why DeWitt believed there was a "military necessity": that loyal and the allegedly treasonous Japanese-Americans could not be distinguished because of their race. As a consequence of the later alterations to the report, "[t]he Justice Department assumed and argued to the Supreme Court that the military necessity arose out of a lack of time to make a separation rather than out of an impossibility of making that separation." Hirabayashi, 627 F.Supp. at 1454.

Only one version of that initial report survived. This copy was virtually

impossible to obtain. The Federal District court for the Western District of Washington in Hirabayashi v. United States, supra, accepted the testimony of a professional researcher "that it would have been impossible for a lay person to locate that copy of the initial version of the Final Report."<sup>2</sup>

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<sup>2</sup>The Hirabayashi Court further explained:

Although she had been employed as an archival researcher on the staff of the Commission on Wartime Relocation and Internment of Civilians between June 1981 and June 1983, she testified that it was not until the end of 1982 that she became aware of the existence of the initial version. This fortuitous find occurred only because she had observed that copy on the desk of an archivist in the Modern Military Section of the National Archives. Upon examining this document, she recognized that its wording was different from that of the published version.

There is no evidence in the record that petitioner actually knew, or had reason to know, of the existence of the initial version of the Final Report prior to the time



Another example of the discrepancy between DeWitt's findings and the intelligence information available to the government discrediting those findings was J. Edgar Hoover's Report. That report was written in response to General DeWitt's conclusion that "there were many incidences of the successful communication of [strategic] information" by radio from the United States mainland to Japanese ships off shore. The FBI investigations, however, uncovered "no evidence of Ship-to-Shore signaling and no evidence of a landing in the area." Hoover Memorandum, February 7, 1944, Box

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that Ms. Herzig-Yoshinaga happened upon it in the National Archives. Furthermore, petitioner did not unduly delay the commencement of this action after he learned of the existence of the initial version of the Final Report.

Hirabayashi, 627 F.Supp. at 1455-56.

37, Folder 3, Fahy Papers, FDRL.

Edward J. Ennis and John Burling, director and assistant director of the Alien Enemy Control Unit, Department of Justice were in charge of preparation of the Supreme Court briefs in Korematsu v. United States, 323 U.S. 214 (1944). They urged Solicitor General Fahy to repudiate DeWitt's assessment one month prior to oral argument. Burling further inserted a footnote in the brief for the purpose of explicitly bringing to this Court's attention the fact that the Justice Department disavowed important portions of DeWitt's Final Report. The proposed footnote read as follows:

The Final Report of General DeWitt is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. The recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several

respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signaling by persons of Japanese ancestry, in conflict with information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not ask the Court to take judicial notice of the recital of those facts contained in the Report.

Burling Memorandum to Wechsler, September 11, 1944, File 146-42-7, DOJ.

Solicitor General Fahy, however, obstructed that attempt to inform this Court of these critical facts. In place of the proposed footnote, the Solicitor General inserted the War Department's version, which only mentioned, in passing, that the views of the Justice and War Departments differed on the issues. This oblique reference to a disagreement concealed from the Court the fact that every governmental branch investigating the assertions in the Final

Report had refuted DeWitt's groundless conclusions. Ennis and Burling continued to urge consideration of use of their proposed footnote which would have provided the only hint that in fact there was no "military necessity."

The footnote proposed by Ennis and Burling was written in the government's Korematsu brief by the time it was sent to press. However, once Solicitor General Fahy was alerted by War Department Staff, he prevented this Court from learning the truth by halting the printing and removing the footnote from the final brief. Burling Memorandum to Ennis, October 2, 1944, File 146-42-7, DOJ. After protest by Ennis and Burling, the Justice Department acquiesced in the War Department's fraudulent contentions of "military necessity."

The Ennis and Burling memoranda are



critical to a full understanding of the magnitude of the fraud on this Court.

There is no doubt that these statements were intentional falsehoods...In view of the fact that General DeWitt in his official report on the evacuation has sought to justify it by making important misstatements of fact, I think it important that this Department correct the record insofar as possible...I assume that the War Department will object to the (true) footnote and I think we should resist any further tampering with it with all our force.

Burling Memorandum, reprinted in  
Korematsu v. United States, 584 F.Supp.  
1406, 1423-24, Appendix B.

Much more is involved than the wording of the footnote. The failure to deal adequately now with [the DeWitt Final] Report cited to the Supreme Court either by the government or other parties, will hopelessly undermine our administrative position in relation to this Japanese problem. [The Justice Department has] proved unable to cope with the military authorities on their own ground in these matters. If we fail to act forthrightly on our own ground in the courts, the whole historical record of this matter will be as

the military choose to state it.

Ennis Memorandum, reprinted in Korematsu,  
584 F.Supp. at 1423, Appendix A.

The historical record was not "set straight." Rather, the government knew this Court was presented with knowingly fraudulent claims of "military necessity" upon which it relied in deciding Korematsu.

General DeWitt's claims of impending national catastrophe have been shown to be nothing more than a manifestation of his own unbridled racism. DeWitt's racism, the sole predicate of the "military necessity" claim advanced to this Court, is evident from his own unabashed statements:

In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States

citizenship, have become  
"Americanized," the racial strains  
are undiluted.

Personal Justice Denied, at 66, quoting  
DeWitt, Final Report at 34 (emphasis  
added).

You needn't worry about the  
Italians at all except in certain  
cases. Also, the same for Germans  
except in individual cases. But we  
must worry about the Japanese all  
the time until he is wiped off the  
map.

Id. (quoting testimony of Lieutenant  
General DeWitt before House Naval Affairs  
Subcommittee, April 13, 1943, Commission  
on Wartime Relocation and Internment of  
Civilians ("CWRIC") document number 1725-  
28).

DeWitt condensed his opinion of a  
policy he had opposed, allowing  
American soldiers of Japanese  
ancestry into the excluded areas,  
by telling the reporters "a Jap is  
a Jap."

Id., (quoting transcript of news  
conference, April 14, 1943, CWRIC

document number 26565).

Yet these knowingly falsified claims  
became the linchpin in this Court's  
wartime decisions in Korematsu and  
Hirabayashi and posed an insurmountable  
obstacle to legal redress for aggrieved  
Japanese-American citizens.

The magnitude of the government's  
willful concealment of critical  
information from this Court and this  
country is extraordinary. Traditional  
equitable tolling principles should lead  
to an affirmance of the judgment below.

#### ARGUMENT

A. Fraudulent Concealment By The United  
States Tolls the Statute of  
Limitations

1. Tolling Is Appropriate Where  
A Fixed Clandestine Policy  
Masks The Cause of Action.

The pertinent part of the governing  
statute of limitations provides as



follows:

Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

28 U.S.C. § 2401(a).

This limitation period, however, is not without exception. The relevant exception, consistently recognized by this Court, is that the statute will be tolled where a defendant fraudulently conceals information requisite to the plaintiffs' cause of action. This equitable principle applies as much to the United States as to any other defendant. Bowen v. City of New York, 90 L.Ed.2d 462 (1986).

In Bowen, this Court unanimously held that the statute of limitations must be tolled where "the government's secretive conduct prevents plaintiffs from knowing of a violation of rights." Id., at 476,

(quoting City of New York v. Heckler, 742 F.2d 729, 738 (2nd Cir. 1984)).

The limitation statute in Bowen, 42 U.S.C. § 405(a), mandated filing a complaint seeking judicial review of a denial of Social Security Disability benefits within 60 days of the Secretary's final decision. Enforcement of such a limit was disapproved where there was a "fixed clandestine policy" against the injured class of applicants. Bowen, at 472, (quoting City of New York v. Heckler, 578 F.Supp. 1109, 1115 (E.D.N.Y. 1984)). The statute of limitations was tolled, and the failure to exhaust administrative remedies excused since "[m]embers of the class could not attack a policy they could not be aware existed." Bowen, at 476, (quoting City of New York, 578 F.Supp. at 1118).

Equitable principles must be invoked to toll statutes of limitation in any case where the government effectively undermines plaintiff's ability to seek an otherwise available remedy for injuries inflicted by the government's own hand.

2. Equitable Tolling Furthers Congressional Intent.

The government's simple assertion that the statutory waiver of sovereign immunity must be strictly construed,

does not answer the question whether equitable tolling can be applied to the statute of limitations, for in construing the statute, we must be careful not to 'assume the authority to narrow the waiver that Congress intended' United States v. Kubrick (1979) 444 U.S. 111, 118, 62 L.Ed.2d 259, 100 S.Ct. 352, or construe the waiver 'unduly restrictively.' Block v. North Dakota, 461 U.S. 273, 287, 75 L.Ed.2d 840, 103 S.Ct. 1811 [(1983)].

Bowen, 90 L.Ed.2d at 474.

The general precept insulating the sovereign from suit is not abrogated by

the equitable rule mandating tolling where the government's "secretive conduct" is the source of the fraud. Rather, this textual application conforms fully to the requisite construction of the statutory waiver of sovereign immunity and the commensurate statutory limitations period.

In Honda v. Clark, 386 U.S. 484, 464 (1967), equitable tolling principles were held applicable to insure recovery of funds by United States residents or citizens of Japanese descent who had such funds confiscated by the United States under the Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App §I et seq. "This Court allowed the limitations period to be tolled during the pendency of related litigation because it was consistent with the statutory scheme and equitable principles to do so." Bowen at

474 n.11 [citation omitted].

The Bowen Court reiterated the propriety of "apply[ing] a traditional equitable tolling principle" to a waiver of sovereign immunity where such application is "consistent with Congressional intent, and called for by the facts of the case." Id. at 474. (citation omitted).

Unlike Bowen and Honda, this case presents no express statutory scheme within which the limitations issue must be analyzed. However, the statutory waiver of sovereign immunity and statutory limitations period are pertinent. Since the Congressional intent of these statutes is satisfied and tolling is "called for by the facts of the case," equitable principles must be applied under Bowen and Honda.

The Congressional intent of 28 U.S.C.

§ 2401(b) -- analogous to that at issue here of § 2401(a)<sup>3</sup> -- was set forth in United States v. Kubrick, 444 U.S. 111, 123 (1979). "[T]he purpose of the limitations statute...is to require the reasonably diligent presentation of tort claims against the government." Id.

Such "reasonable diligence" is obviously impossible where, as here, "facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." Id. at 122. Since crucial information about the government's deception of this Court were unavailable to the Hohri plaintiffs,

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<sup>3</sup>The limitations statute (28 U.S.C. § 2401(a)) has a six-year limitations period, unlike the two-year limitations term under § 2401(b). Nonetheless, the legislative history and subsequent decisions make the analogy relevant. See Hohri, 782 F.2d at 247 n.50, and cases cited therein.



tolling the statute would further the intent of Congress. See Kubrick, at 122-23.

Kubrick, however, did not even address the question of equitable tolling of limitations statutes where the government itself fraudulently concealed "the very cause of action." cf. Hobson v. Wilson, 737 F.2d 1, 35 (D.C.Cir. 1984), cert. denied, 470 U.S. 1084, (1986); Richards v. Mileski, 662 F.2d 65, 71 (D.C.Cir. 1981). In such cases, it is unquestionably far more difficult for a "reasonably diligent plaintiff" to uncover and acquire facts concerning the claim.

In a case presenting such sweeping, government-perpetrated, fraudulent concealment, Congressional intent can only be effectuated by tolling the statute of limitations. Bowen, at 476;

Kubrick, at 122-23; Honda, at 499-500; Holmberg v. Armbricht, 327 U.S. 392, (1946); Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1875); Barrett v. United States, 689 F.2d 324, 727-728 (2d Cir. 1982) cert. denied, 462 U.S. 1131 (1983). These well established principles should be applied to toll the statute of limitations in this case.

B. Plaintiffs' Cause of Action Could Not Have Been Discovered Until the Government Fraud Was Revealed

The rule employed by the Court of Appeals in discerning when respondents' cause of action accrued was set forth in Fitzgerald v. Seamans, 553 F.2d 220, 228 (D.C.Cir. 1977). There, the District of Columbia Circuit stated that, in the case of defendant's fraud or deliberate concealment of material facts relating to its wrongdoing, a plaintiff's claim does

not accrue until the plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit. This rule has been given varying interpretations. See Richards v. Mileski at 71 (D.C. Cir. 1981) (statute of limitations tolled by fraudulent concealment of plaintiffs "cause of action" until plaintiff has, or through due diligence should have had, notice of his claim); Smith v. Nixon, 606 F.2d 1183, 1191 (D.C. Cir. 1979), cert. denied, 453 U.S. 912, reh. denied, 453 U.S. 928 (1981).

Two types of fraudulent concealment situations have been recognized. The first occurs where the acts of concealment are coupled with the primary wrong. In this type of active concealment an aggrieved plaintiff is not required to use due diligence and the

cause of action cannot accrue until the wrong is actually discovered. Hobson, at 33, 34 n.103, (citing Tomera v. Galt, 511 F.2d 504, 510 (7th Cir. 1975)). In the second type of situation, which is considered "self-concealing," the fraud goes undiscovered even though the defendant after commission of the wrong does nothing to conceal it. "The plaintiff's due diligence is essential here..." Hobson, at 34, n.103 (quoting Tomera, at 510).

The Court of Appeals found that the wrong in this case was self-concealing and thereby applied the more rigid standard requiring due diligence in discovery of the fraud.

Amici urge, however, that the less stringent "actual discovery" standard is appropriate in this case. None of the information material to respondents'

cause of action was released publicly until the 1983 CWRIC report. The government not only failed to make the material available when it had ample opportunity to do so, but also denied its very existence to professional archivists. All of this militates against applying a "due diligence" standard and in favor of applying the "active concealment" test. Yet, even if the "due diligence" doctrine is applied, it is clear that respondents have met and exceeded the demands of this more stringent standard.<sup>4</sup>

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<sup>4</sup>A determination that plaintiff's diligence was inadequate is, at best, a troublesome and dubiously valid task prior to a jury trial. Richards, at 73 n.13. A statute of limitations defense cannot be decided on a motion to dismiss unless it appears beyond doubt that plaintiff can prove no facts to entitle him to relief. Jones v. Rogers Memorial Hospital, 442 F.2d 773, 775 (D.C.Cir. 1971); Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959) (question

A review of the facts available at this stage of these extraordinary proceedings demonstrates that plaintiffs, acting with due diligence, were prohibited from determining the "cause of action" prior to release of the critical documents demonstrated a concerted plan to defraud the Supreme Court. Richards, 662 F.2d at 71; Smith, at 1191; Fitzgerald, at 228.

Amici contend that the government blatantly lied to the Court when it knew there was no "military necessity" justifying the internment order and then suppressed the documentation of that deception. The plaintiffs had a claim only when they learned of this deception and not simply when information contrary

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of plaintiff's diligence "cannot be decided at this stage" on a motion to dismiss).



to the prior claim of "military necessity" became available.

This Court deferred to the judgment of the military that "military necessity" warranted the orders imposing curfews in Hirabayashi, and implementing the Japanese-American evacuation in Korematsu. This is demonstrated by the plain language in Korematsu:

Here, as in the Hirabayashi case [citations omitted] we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying

to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground."

Korematsu, 323 U.S. at 218-219 (emphasis added).

The military deceived this Court regarding the existence of a "military necessity." As the district court below stated,

It is undisputed that reports from the FCC, the FBI and Naval Intelligence contradicting the claim of military necessity were concealed by defendant throughout the war, as most graphically illustrated by the Ennis and Burling memoranda urging the disclosure of these findings in the Hirabayashi and Korematsu briefs. Obviously, Ennis and Burling strongly believed that these documents could have affected the Supreme Court decisions.

Hohri v. United States, 586 F.Supp. 769, 787-88 (D.D.C. 1984).

Every court which has been presented with the issue has concluded that a fraud on this Court was perpetrated and

concealed by the military. Hohri v. U.S., 782 F.2d 227 (D.C. Cir. 1986); Korematsu, 584 F.Supp. 1406); Hirabayashi v. U.S., 627 F.Supp. 1445 (W.D.Wash. 1986), appeal pending, No. 86-3853 (9th Cir.); Yasui v. United States, CV-83-151-BE (Order of January 26, 1984 D. Ore.) appeal pending No. 84-3730 (9th Cir.).

There is no support for the government's argument "that all of the arguably material evidence that was not disclosed to this Court become public and [was] available to diligent plaintiffs from the late 1940's onward." Gov. Br. at 42 (citation omitted).

It is true that information contradicting DeWitt was alluded to in 1949. M. Grodzins, Americans Betrayed (1949). What was neither discovered nor discoverable was the fact that the War Department purposefully conspired to

conceal from the Supreme Court the fact that the government knew there was no "military necessity." This is evidenced by the impossibility of locating the one copy of the original Final Report and the Ennis and Burling memoranda until the early 1980's. See JA 300-308 Affidavit of Peter Irons.

Since this Court based the wartime Japanese-American isolation and internment decisions expressly upon its refusal to reject the claim of "military necessity" judicial avenues of redress were effectively closed until the intentional fraudulent justification became known. These facts themselves were kept out of potential plaintiffs' reach for forty years.<sup>5</sup>

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<sup>5</sup>Congress recognized in 1980 that "no sufficient inquiry has been made into the internment prior to that time. Pub.L. 96-3172(a)(3), 94 Stat 964. This

Established rules of procedure make it clear that respondent could not have stated a cause of action until the present decade sufficient to survive a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure. Mere suspicion alone does not give respondents a cause of action against the government. Laird v. Tatum, 408 U.S. 1 (1972) reh.

was, in fact, the express purpose of formation of the CWRIC. Clearly, Congress found that neither the selective inferences to irrelevant documents nor a Presidential Proclamation were not remotely sufficient to discredit the determination of military necessity and reveal the cause of action.

As respects the war-making powers, it is Congress which is recognized as the significant authority to determine the efficacy of a particular military decision. United States Constitution, Art. I, § 8; Rostker v. Goldberg, 453 U.S. 57, 64-68; 69 L.Ed.2d 478, 1101 S.Ct. 2646; (1981). See Chevron, U.S.A. v. Natural Res. Defense Council, 467 U.S. 837, 843 n. 9, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984) (if "Congress had an intention on the precise question at issue, that intention is the law and must be given effect.")

denied, 409 U.S. 901 (1972).

Neither the fraud perpetrated upon this Court by the military, nor the specific and continuing acts of fraudulent concealment could have been pleaded with the requisite specificity until the early 1980's. Any prior filing of the complaint would have been susceptible to challenge under the authority of the many cases which interpret Rule 9 of the Federal Rules of Civil Procedure as mandating that fraud be pled with particularity. Totalplan Corp. of America v. Lure Camera Ltd., 613 F.Supp. 451 (W.D.N.Y. 1985); Democratic Nat. Committee v. McCord, 416 F.Supp. 505 (D.D.C. 1976).

The government's invitation to this Court to adopt the position that a "diligent" plaintiff should have filed an earlier, insufficient claim should be



declined in light of the facts demonstrating the continuing concealment of critical information by the government into the 1980's.

#### CONCLUSION

This case presents the Court with constitutional violations of extraordinary magnitude. The singular status of these wartime decisions is apparent.

Justices of that Court and legal scholars have commented that the decision is an anachronism in upholding overt racial discrimination as "compellingly justified." "Only two of this Court's modern cases have held the use of racial classifications to be constitutional." Fullilove v. Klutznick, 448 U.S. 448, 507, 100 S.Ct. 2758, 2789, 65 L.Ed.2d 902 (1980) (Powell, J., concurring and referring to Korematsu and Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943)). See also L.H. Tribe, American Constitutional Law §§ 16-6, 16-14 (1978).

Korematsu, 584 F.Supp. at 1420.

The wartime decisions would not, indeed could not, have had the same outcome if the military establishment had not deceived this Court. The fraud thrust upon this Court caused it to defer to the judgment of "military necessity"-- just as the War Department knew it would. Such a fraud on this Court and on all United States citizens of Japanese ancestry, must not be condoned.

[Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944). This Court now has the opportunity -- perhaps the only opportunity it will ever have--

to correct this monumental injustice.  
This Court may do so by applying  
traditional equitable tolling principles  
and finding that respondents' claims  
could be brought within six years of the  
public release of the documents  
indicating the government's fraud on this  
Court.

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wp/misc  
Hohri.br3

**AMICUS CURIAE**

**BRIEF**



10  
No. 86-510

Supreme Court, U.S.

FILED

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IN THE SUPREME COURT OF THE

JOSEPH F. SPANOL, JR.  
UNITED STATES

OCTOBER TERM, 1986

UNITED STATES OF AMERICA

v.

WILLIAM HOHRI, ET AL.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICI CURIAE  
FRED KOREMATSU, GORDON HIRABAYASHI  
and MINORU YASUI  
IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

With the consent of petitioner and respondents, Fred Korematsu, Gordon Hirabayashi and True Yasui, on behalf of her recently deceased husband Minoru Yasui, appear as amici curiae in support of respondents. During World War II, Messrs. Korematsu, Hirabayashi and Yasui were arrested and convicted of violating military orders implementing the internment and suspending the freedoms of all persons of Japanese ancestry on the West Coast. Their constitutional challenges to these military orders resulted in this Court's landmark decisions in Korematsu v. United States, 323 U.S. 214 (1944), Hirabayashi v. United States, 320 U.S. 81 (1943) and Yasui v. United States, 320 U.S. 115 (1943), which upheld the constitutionality of the curfew, exclusion and incarceration of

Japanese-Americans.<sup>1/</sup> These opinions sanctioned the wrongful internment of more than 110,000 American citizens and resident aliens of Japanese ancestry and, in doing so, condoned one of the most sweeping deprivations of civil liberties in this country in modern times.

Recently discovered evidence has shown that, during its prosecution of amici's cases, the government knowingly altered, destroyed and suppressed material evidence demonstrating that the internment was factually unsupportable, and thus obtained this Court's favorable rulings by a knowing course of misconduct. In January 1983, based on these

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<sup>1/</sup> Because Japanese immigrants were barred from becoming naturalized citizens, the term "Japanese Americans" is used in this brief to refer to Americans of Japanese ancestry, whether citizens or non-citizens, who were affected by the military orders authorized by Executive Order 9066.

discoveries, Messrs. Korematsu, Hirabayashi and Yasui reopened their historic cases through separate petitions for writs of error coram nobis filed in their original courts of conviction. In these petitions, amici demonstrated that government documents discovered since late 1981 proved that their cases were decided on a fabricated record which high-ranking government officials knew to be false. These newly discovered documents showed not only that the government deliberately concealed intelligence reports refuting the claim that Japanese Americans posed a threat to the military security of the West Coast, but that, in order to conceal the lack of any military judgment for the race-specific measures taken against Japanese Americans, the government altered the official statement of

the military commander to remove statements showing that race prejudice rather than military considerations underlay his decision and, knowing the falsity of that document, warranted its credibility to this Court. Based on this evidence, the exclusion order convictions of Fred Korematsu and, after a two week trial, of Gordon Hirabayashi were vacated. See Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wa. 1986) (cross appeals pending); Korematsu v. United States, 584 F.Supp. 1406 (N.D. Cal. 1984). The conviction of Minoru Yasui for curfew violation was also vacated, although the district court did not reach the charges of misconduct. Yasui v. United States, D.Or. No. 83-151 BE, order of January 26, 1984 (cross appeals pending).

The interest of Messrs. Korematsu,

Hirabayashi and Yasui in the present proceeding is manifest. While their original cases involved criminal proceedings against individual defendants, all parties, including the government, understood that they were the test cases by which the constitutionality of the wartime internment program would be adjudicated. The trials and subsequent appeals of these three men represented the trial of all those wrongfully incarcerated. Amici have carried the burden that this Court's rejection of their claims essentially upheld the constitutionality of the internment and thereby adjudicated that the constitutional rights of those interned were not violated. The government's intentional course of misconduct constituted a fraud on this Court, deprived them and all Japanese-Americans of their most funda-



mental freedoms and stands as one of the most tragic abuses of power in this country's history.

Forty years later, also based upon these discoveries of governmental misconduct in the Korematsu, Hirabayashi and Yasui cases, Japanese-Americans were able to initiate the instant proceeding for damages based on their wrongful internment. As it did in amici's coram nobis proceedings, however, the government has opposed relief. In arguing that respondents' remaining claim for an unconstitutional taking of property without just compensation is time-barred, however, the government grossly mischaracterizes this Court's original decisions in Korematsu, Hirabayashi and Yasui and not only ignores but seeks to direct this Court's attention from the recently discovered evidence of its

misconduct in the 1940's.

By this brief, Messrs. Korematsu, Hirabayashi and Yasui again seek to set the record straight. As the parties to this Court's landmark decisions, these men are in a unique position to correct the government's attempt to obfuscate both the basis and significance of this Court's decisions. These men are also in a unique position, having litigated the misconduct charges in their recent coram nobis proceedings, one of which was afforded a two-week trial, to advise this Court on the evidence showing the intentional alteration, destruction, suppression and misrepresentation of evidence in their original cases.

Joining Messrs. Korematsu, Hirabayashi and Yasui on this brief are the Asian American Legal Defense and Education Fund, the Japanese American

Citizen League and the Anti-Defamation League of B'nai B'rith.

SUMMARY OF ARGUMENT

In the 1940's, this Court issued decisions in amici's cases which were based on an intentionally distorted record. In amici's recent coram nobis cases, and in the present proceeding, the government has chosen to defend that record. In defending the internment, the government has trivialized and distorted this Court's decisions in amici's cases, and ignored the existence and significance of the recently discovered evidence of governmental misconduct. Amici here seek to correct the distorted record which the government has again placed before this Court. Amici argue as follows:

1. Recently discovered evidence shows that, in prosecuting amici's

cases, the government was aware of evidence conclusively refuting the military necessity claimed to justify the internment and withheld such evidence from the Court. These discoveries made it possible to reopen amici's cases through their coram nobis petitions and for Japanese Americans to seek monetary damages for the wrongful internment. The government ignores the existence and significance of this evidence.

a. Internal Justice Department memoranda discovered in October 1981 revealed that, as early as April 1943, the Department knew of evidence contradicting the military necessity asserted in Hirabayashi and Yasui to justify the curfew and exclusion orders. The Department attorneys responsible for the prosecution of amici's cases unsuccessfully argued to their superiors that

any failure to disclose the evidence to this Court "might approximate the suppression of evidence."<sup>2/</sup>

b. In 1982 the Congressional Commission on the internment discovered that the War Department had altered the Final Report of General John L. DeWitt, military commander of the West Coast, to hide the fact that racial, ethnic and cultural suspicions rather than military considerations formed the basis of his ostensibly military judgment that the mass internment of Japanese Americans was necessary. The copies of this original Final Report were ordered destroyed. The War Department withheld the altered Final Report from the Justice Department until January 1944, after Hirabayashi and Yasui were decided,

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<sup>2/</sup> Memorandum from Edward Ennis to Solicitor General Fahy, April 30, 1943. J.A. 264, 268.

although it was submitted to the Court through the amicus brief of the West Coast states in those cases. The altered Final Report was not submitted to the Court until Korematsu.

c. In May 1985, the transcript of Solicitor General Fahy's oral argument to this Court in Korematsu was discovered. Justice Department memoranda previously discovered in October 1981 revealed that government attorneys had sought to insert a footnote in the government's brief in Korematsu disclaiming reliance on the Final Report. The footnote, however, was carefully rewritten to obscure any such disclaimer. In his oral argument to this Court, Solicitor General Fahy not only explicitly affirmed the government's continuing reliance on the Final Report, but conceded that, if Gen. DeWitt's decision



had been based on racial hostility rather than his military judgment, the internment would have been illegal.

2. In connection with its present arguments on the limitations issue, the government claims that this Court did not rely upon the judgment of the West Coast military commander, but upon the alleged racial character of Japanese Americans, in reaching its decisions in amici's cases. The government's claim is astonishing, as much for its patent inconsistency with this Court's decisions and the government's position in the 1940s as for its implicit acceptance of the validity and utility of an argument so repugnant to our basic values.

Forty years ago, amici sought this Court's recognition that the internment of Japanese-Americans was factually unjustified and in violation of our basic

constituting principles. Over time, it has become increasingly clear that this Court's World War II decisions were based on tragically erroneous information, but not until recently was it learned that the false record was knowingly created. This Court must be aware of that history and, in particular, of the significance of the government's misconduct in the prosecution of amici's original cases that has only recently come to light.

#### ARGUMENT

##### I.

#### ONLY THE RECENT DISCOVERY OF EVIDENCE OF INTENTIONAL GOVERNMENT MISCONDUCT MADE POSSIBLE THE REOPENING OF THE INTERNMENT CASES

In January 1983, Fred Korematsu, Gordon Hirabayashi and Minoru Yasui each filed writs of error coram nobis based upon previously unpublished documents

showing that the government purposefully suppressed, altered and destroyed exculpatory evidence in order to uphold the constitutionality of their convictions. The effect of the government's misconduct extended far beyond amici's three individual misdemeanor cases by validating the assertions of military necessity used by the government to support the entire program of forced removal and detention of Japanese Americans.

In the instant case, as in amici's coram nobis actions, the government seeks to dismiss the importance of these discoveries by diverting the Court's attention to the actual intelligence reports which, although concealed in amici's cases, were subsequently published in the late 1940s and early 1950s. Amici's coram nobis petitions, however, were unquestionably based on

the newly discovered evidence which showed that the government was aware that the internment program was unsupported by any evidence of a military threat posed by Japanese Americans, and that this Court's rulings were obtained by intentional government misconduct. As discussed in detail below, the Justice Department memoranda showing the government's suppression of intelligence reports in amici's cases were not discovered until October 1981. Similarly, the evidence of the alteration, suppression and destruction of Gen. DeWitt's original Final Report was not discovered until late 1982, and the transcript of Solicitor General Fahy's oral argument in Korematsu was not discovered until May 1985.

Notwithstanding these discoveries, the government asserted laches as an

equitable defense to the Hirabayashi and Yasui coram nobis petitions. Recognizing that the petition was based on recently discovered evidence, in particular the War Department's alteration of Gen. DeWitt's original Final Report, the District Court in Hirabayashi rejected the government's defense. Hirabayashi, supra, 627 F. Supp. at 1455-1456. (This issue is presently pending before the Ninth Circuit Court of Appeals.) Similarly, the District Court's decision vacating Mr. Korematsu's conviction was based on the recently discovered Justice Department memoranda revealing the intentional suppression of material evidence. Korematsu, supra, 584 F. Supp. at 1417-1419. Although the government had not expressly raised a laches defense, the District Court noted that the government had failed to rebut Mr.

Korematsu's showing of timeliness and found that:

It appears from the record that much of the evidence upon which petitioner bases his motion was not discovered until recently. In fact, until the discovery of the documents relating to the government's brief before the Supreme Court, there was no specific evidence of governmental misconduct available. Id. at 1419.

Only the discovery that the tragically deficient record before this Court was the result of the government's deliberate misconduct made it possible for amici to reopen their cases. Although the limitations issue presented here differs from the equitable laches defense in the coram nobis cases, respondents' claims are based, in part, on the same discoveries. Until these discoveries made this action possible for all Japanese Americans wrongfully interned, the limitations period applicable to their claims should be tolled.



## II.

### THE GOVERNMENT VIOLATED CONSTITUTIONAL DUTIES BY ALTERING, DESTROYING, SUPPRESSING AND MISREPRESENTING MATERIAL EXCULPATORY EVIDENCE IN ITS POSSESSION.

#### A. The Prosecutor's Duty To Produce Exculpatory Evidence Is Not Limited To Evidence Rebutting Explicitly Stated Assertions.

In its brief, the government disclaims any duty to produce exculpatory evidence, asserting essentially that no fraudulent concealment of evidence was committed unless the undisclosed material related to a specific government averment. This extremely narrow interpretation of its constitutionally compelled duty is misleading, disingenuous and contrary to the law. By focusing only on specific assertions presented to the court, the government seeks to extinguish its duty to produce potentially exculpatory evidence material to the subject matter of the Court's inquiry.

The government fails to cite any precedent for its strained interpretation of the prosecutor's ethical duty for it is, in fact, contrary to long-standing legal precedent. In the landmark case of Brady v. Maryland, 373 U.S. 83 (1963), the Court held that the prosecution's suppression of material "evidence favorable to the accused" and "material either to guilt or to punishment" could violate due process regardless of the prosecution's good or bad faith. Id. at 87. Brady did not limit the required production of exculpatory evidence only to that rebutting specific assertions made by the prosecution.

Cases following Brady expanded upon the prosecutorial duty to disclose such favorable evidence, vacating convictions on due process grounds where the prosecution introduced perjured or false evi-

dence, material to the conviction, which it knew or should have known was false. United States v. Agurs, 427 U.S. 97, 103 (1976); United States v. Bagley, 473 U.S. \_\_\_, 87 L.Ed. 2d 481, 105 S.Ct. 835 (1985). In Agurs, this Court also made clear that a conviction would be vacated for a denial of due process where obviously exculpatory evidence, unknown to the defense but known to the prosecution, was not disclosed and the evidence was clearly supportive of a claim of innocence. Agurs, supra at 106. The government's confined construction of its duty to the accused simply does not square with established precedent or the Constitution.

The government's unsupported and limited interpretation of the duty to produce exculpatory evidence, however, is tailored to excuse the suppression of

evidence related to the alleged racial characteristics of Japanese Americans which, the government argued in amici's cases, supported an inference of disloyalty and danger ostensibly justifying the imposition of race-specific measures. The government admits that, with one exception, it offered no evidence of "specific conduct alleged to be indicative of past or planned subversive activity," and that it supported its claim of military necessity with "ancestral, cultural and ethnic considerations." Gov. Br. at 31, 32.

The government fails to mention, however, that it lacked any evidence of past or planned subversive conduct and that in order to establish the requisite danger justifying such drastic orders, the government had to establish the danger through implication and innuendo

rather than through specific facts. The resulting "racial characteristics" argument linking Japanese Americans to subversive activities to justify the curfew and exclusion orders became the centerpiece of the government's position in amici's cases.

B. The Government Devised A Strategy To Avoid Being Forced To Submit Specific Evidence Of Japanese American Disloyalty.

From the earliest stages of these cases, the Justice Department recognized the difficulty in proving that Japanese Americans posed a danger to the national security. By necessity, since the government lacked any evidence of sabotage or espionage committed or planned by Japanese Americans, or any evidence that they were planning to assist Japan in a possible invasion of the West Coast,<sup>3/</sup>

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<sup>3/</sup> The government implies that the "Magic" (footnote continued)

the government had to build a case on implications and inferences rather than on hard facts of actual danger.

In a memorandum entitled "Method of Presenting Facts Relevant to Constitutionality of Japanese Evacuation Program," Nanette Dembitz, an attorney with

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Cables", intercepted Japanese diplomatic messages, may have contained evidence of Japanese American disloyalty providing a basis for the formulation of the internment program. Gov. Br. at 36 n. 30. In June 1985, the Government attempted to prove this theory at the trial of Mr. Hirabayashi's coram nobis petition through the testimony of David Lowman, but this testimony was refuted by Lt. Col. Jack A. Herzig, Ret. Notably, the District Court did not find this "magic" evidence of sufficient relevance to mention it in its decision. Hirabayashi, supra, 627 F. Supp. 1445. Significantly, in his earlier testimony before Congress, Col. Herzig had also refuted Mr. Lowman's theories on the magic cables. See: Japanese-American and Aleutian Wartime Relocation: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 450-548, 868-881 (testimony of D. Lowman), 801-867 (testimony of Col. Herzig) (1984). The government's present speculative theory similarly lacks any evidentiary support.



the Alien Enemy Control Unit of the Department of Justice, urged that the government use the following approach in presenting the Hirabayashi case to this Court:

It appears that facts as to the following matters should be presented to the Court: The number of persons of Japanese ancestry, both alien and non-alien, in the United States; the concentration of such persons in Pacific Coast States; the history of hostility toward such persons in such States; the lack of assimilation of such persons in the population as a whole; the existence of methods by which the loyalty of such persons to Japan might have been encouraged, such as the activities of Japanese Consuls, the return of such persons to Japan for education, the dual citizenship of American citizens, and activities of shinto priests; the engagement of such persons in espionage and sabotage;...the acts of violence toward the Japanese in the Pacific Coast States....4/

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4/ Memorandum, Nanette Dembitz to John L. Burling, August 11, 1942, File 31.090, Box 332, Record Group 210, National Archives.

After canvassing existing precedent, Dembitz offered the following advice:

As to the facts in point with respect to the Japanese program, it appears that all of them could be established to the Court's satisfaction without the introduction of evidence and that even the citation of documentary authority would not be necessary with respect to many of them; however, it is obvious that as much documentary authority as is available should be used. It would also appear that the facts could be sufficiently established, without the use of evidence, so that the Court would refuse an offer of evidence to contradict these facts. Ibid.5/

Following this blueprint, the "racial characteristics" argument was extensively presented in the government's Hirabayashi brief, incorporated in its contemporaneous brief in Yasui, and, over a year later, presented to this Court in Korematsu. As suggested by Dembitz, and as required by the ab-

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5/ Notably, this memorandum was written only a month after Judge Fee at the trial of Minoru Yasui held that direct evidence on the disloyalty issue would be irrelevant.

sence of any evidence of Japanese American disloyalty, the government asked this Court to take judicial notice of certain racial and cultural characteristics of Japanese Americans from which disloyalty could be inferred. By employing judicial notice, the government was able to avoid any vigorous evaluation by this Court of the "evidence" of the alleged racial characteristics of Japanese Americans. The government could have proven its reprehensible quasi-sociological claims in no other way. The approach was, unfortunately, successful for, in the Hirabayashi decision, this Court virtually adopted wholesale the "facts" suggested by the government directly into its decision. Hirabayashi, supra, 320 U.S. 81, 96-98.

Ironically, even though Ms. Dembitz recommended the evidentiary strategy and

signed the government's brief in Hirabayashi, she later explicitly recanted her position.<sup>6/</sup> In her article, Ms. Dembitz examined virtually every piece of "evidence" submitted to the Supreme Court in each of amici's cases and concluded that the "facts" placed on the record by the government were not susceptible to judicial notice:

A "reasonable" man could not and would not have come to a positive conclusion, on the basis of the available documentary data, that most of the supposed influences toward disloyalty did not in fact exist; a belief in their existence could not be said to rest on "reasonable or substantial ground" Id. at 185-186.

Unknown at the time of Ms. Dembitz' article, however, was that the government not only lacked direct evidence of a military necessity, but also possessed

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<sup>6/</sup> See Dembitz, "Racial Discrimination and the Military Judgment: The Korematsu and Endo Decisions," 45 Colum. L. Rev. 175, 185 n.9 (1945).

material evidence contradicting the government's theory of racial predisposition to disloyalty. This evidence, discovered in the 1980s, was fraudulently concealed from this Court.

C. The Government Suppressed Evidence Refuting Its General Argument Of Racial Predisposition To Disloyalty.

The racial characteristics argument was central to both the government's case (Gov. Br., Hirabayashi, at 18-32, 61-63) and this Court's decision determining the constitutionality of the the wartime orders. Hirabayashi, supra, 320 U.S. 81, 96-99. Thus, evidence contradicting or impeaching either the government's description of, or the assessments of danger ostensibly posed by such alleged racial characteristics were likewise relevant and material. Yet it is precisely this exculpatory evidence

that the government had in its possession, but elected to suppress, before this Court issued its decisions in any of amici's cases.

Notable among the evidence suppressed was a report of the Office of Naval Intelligence, authored by Lt. Cmdr. K.D. Ringle, which dealt specifically with the racial characteristics argument proposed by the government.<sup>7/</sup> This Report, which represented the assessment of the agency designated by President Roosevelt in June 1939 to maintain surveillance of the Japanese American communities on the West Coast, made findings favorable to Japanese Americans on virtually all of the facts cited against them by the government and relied upon by this Court. Moreover,

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<sup>7/</sup> See Report on the Japanese Question by Lt. Commander Kenneth D. Ringle, U.S. Navy, January 26, 1942. J.A. 226.



the Report concluded that Japanese Americans were not a danger, were loyal to the United States for the most part and that any problems should be handled on an individual, not racial basis. Id. at 227-229.

The Ringle Report was suppressed with knowledge of its relevance and significance. Edward Ennis, Director of the Alien Enemy Control Unit of the Department of Justice, reviewed the Ringle report before the Hirabayashi decision was issued and felt it was the "most reasonable and objective discussion of the security problem presented by the presence of the Japanese minority."<sup>8/</sup> Precisely because contradicted the position of Gen. DeWitt and the

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<sup>8/</sup> Memorandum from Edward Ennis to Solicitor General Fahy, April 30, 1943, J.A. 264, 267.

Justice Department, Ennis felt a duty to present it to the Supreme Court:

In view of this fact, I think we should consider very carefully whether we do not have a duty to advise the Court of the existence of the Ringle memorandum and of the fact that this represents the view of the Office of Naval Intelligence. It occurs to me that any other course of conduct might approximate the suppression of evidence. Id. at 268.

Unfortunately, the Ringle Report was never submitted to the Court. Without contradictory evidence, the racial characteristics argument became a powerful and disturbing weapon against Japanese Americans. What the government could not prove directly, i.e., that Japanese Americans posed a danger to the United States, it presented through unfair innuendoes and suggestions. Moreover, the government was not even required to prove these "facts" since the

court accepted them into the record through judicial notice.

The government's argument was adopted by the Supreme Court in 1943 and 1944. Today, the government's claim that it merely raised simple cultural facts in the Hirabayashi, Yasui and Korematsu cases belies the serious implications of these assertions--that because of their supposed cultural and ethnic characteristics, Japanese Americans were a potential menace to their own country and were properly subjected to mass exclusion and incarceration. Guilt by implication here was no less damaging than a direct accusation of treason.

D. The Government Wrongfully Altered and Suppressed Evidence Refuting The Claim That The Internment Was Based On Military Necessity.

1. This Court Relied On The Military Commander's Assessment of Military Necessity in the Hirabayashi, Yasui and Korematsu Decisions.

The government asserts that in Hirabayashi and Korematsu this Court did not base its decisions on the judgment of the West Coast Military Commander that military considerations necessitated measures directed specifically at Japanese Americans, but that it instead "squarely based its decisions on what it then perceived as 'the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry' (Hirabayashi, 320 U.S. at 101)." Gov. Br. at 36-37. This asser-

tion, which quotes this Court out of context, is both legally wrong and highly dangerous.

The danger of this argument lies in the plain implication that this Court has sanctioned the use of invidious discriminations based solely on race or national ancestry in matters pertaining to national security. As amici's cases underscore, such a standard is indeed "odious to a free people," because it invites and condones invidious discrimination based solely on racial suspicions, fears and hatreds. Amici resubmit to this Court that such a standard is "odious" to our most fundamental values and is constitutionally unacceptable under any circumstances.

The government's argument is also legally wrong because, in point of fact, this Court tested the validity of the

military orders on the basis of the "standard authorized by the Executive Order--the necessity of protecting military resources in the designated areas against espionage and sabotage."

Hirabayashi, supra, 320 U.S. at 103.

Thus, this Court held that:

The military commander's appraisal of facts in light of the authorized standard, and the inferences which he drew from those facts, involved the exercise of his informed judgment. But as we have seen, those facts, and the inferences which could be rationally drawn from them, support the judgment of the military commander, that the danger of espionage and sabotage to our military resources was imminent, and that the curfew order was an appropriate measure to meet it. Id. at 103-104.

Similarly, in Korematsu, this Court also looked to the opinion of the military commander to determine whether the exclusion order was an invalid racial discrimination and found:

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence



of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the whole group was rested by the military on the same ground. The judgment that exclusion of the whole group was a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. (Emphasis added.) Korematsu, supra, 323 U.S. at 218-219.

Moreover, it was crucial to the Court in both decisions that:

[W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.  
Id. at 218.

Thus, the opinions asserted by the military authorities were unquestionably the

basis for the Court's decisions in amici's cases. Id. at 223-224.

Because this Court relied heavily upon the opinions of the military commander presented by the government, evidence impugning his determination that the threat of espionage or sabotage from the Japanese American community required race specific measures was crucial in amici's cases. Instead of producing such evidence however, the government engaged in an extraordinary and far-reaching course of suppression, alteration and destruction of such evidence.

2. The Government Suppressed Material Evidence Refuting The Claimed Military Necessity For The Internment.

Consistent with its narrow interpretation of the prosecutorial duty to produce exculpatory evidence, the government argues that it did not fraudu-

lently conceal evidence by failing to disclose memoranda to the Department of Justice from the Chairman of the FCC, James L. Fly<sup>9/</sup> and the Director of the FBI, J. Edgar Hoover<sup>10/</sup> which unequivocally refuted the claims made in Gen. DeWitt's Final Report that Japanese Americans were engaged in illegal shore-to-ship signalling. Attorneys for the Justice Department recognized the inaccuracy of DeWitt's allegation but were thwarted in their attempt to advise this Court of both the inaccuracy and availability of conclusive contrary evidence.<sup>11/</sup> (See Arg. III.A, infra.)

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<sup>9/</sup> Letter from FCC Chairman James L. Fly to Attorney General Francis Biddle, April 4, 1944, J.A. 238.

<sup>10/</sup> Memorandum, J. Edgar Hoover to the Attorney General, February 7, 1944, Folder - Japanese Relocation Cases III, Bos 37, Fahy Papers Franklin D. Roosevelt Library, Hyde Park, N.Y.

<sup>11/</sup> Memorandum, John L. Burling to Assistant  
(footnote continued)

Rather than specifically citing shore-to-ship signalling as evidence for the claimed military necessity, the government submitted the entire Final Report containing that claim to the Supreme Court as evidence in support of its position. Indeed, the "self-serving" Final Report was virtually the only evidence in the record as to the reasonableness of the exclusion. Korematsu, supra, 323 U.S. 214, 245 (Jackson, J., dissenting.) Evidence in the FCC and FBI memoranda, though relevant and material to show lack of involvement by Japanese Americans in subversive activities was never seen by the Supreme Court. Since the government was aware of the falsity of the Final Report, allowed it to be submitted to this Court through

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(footnote continued from previous page)  
Attorney General Herbert Weschler,  
September 11, 1944, File 146-42-7,  
Records of the Department of Justice.

the West Coast State amici's in Hirabayashi<sup>12/</sup>, directly submitted it to this Court in Korematsu, and warranted its validity to this Court in the Korematsu oral argument (see Arg. III.B), the government's present denial of responsibility rings hollow indeed.

Even if the evidence refuting the signalling allegation did not impeach a specific government assertion, it was clearly relevant to the credibility of Gen. DeWitt's military judgment which, as discussed above, constituted the central basis for this Court's decisions in amici's cases. Hence, any evidence which tended to discredit, let alone refute, the "facts" upon which Gen. DeWitt relied was critical to the Court's determination of the issues.

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<sup>12/</sup> Memorandum, Edward Ennis to Herbert Wechsler, September 30, 1944. J.A. 272, 275.

Had this Court been made aware that Gen. DeWitt's claims were, in the government's attorneys' words, "intentional falsehoods," the Court could not have so easily deferred to DeWitt's proffered judgment and would have been required to rigorously examine the government's claim that the internment was justified by a military necessity.

Neither was the government relieved of its duty to produce exculpatory evidence because this Court did not explicitly cite the signalling allegations in the Korematsu opinion. The suggestion that the government may mislead the courts by depriving a defendant of evidence relevant to a defense, so long as a court does not specifically cite the disputed evidence is utterly antithetical to the principles of American justice. The duty to produce arose with



the submission of evidence known to be false, misleading or controverted. The subsequent actions of the Court, which in fact relied upon the judgment of the military commander, did not alter that duty.

3. General DeWitt's Final Report Was Materially Altered to Hide The Fact That The Internment Was Based On Racial Prejudice Rather Than Valid Military Considerations.

In late 1982, CWRIC researcher Aiko Herzig-Yoshinaga made the startling discovery of an initial version of General DeWitt's Final Report containing statements contrary to the government's position in its defense of the internment program. Hirabayashi, supra, 627 F. Supp. 1445, 1455-1456. The existence of this initial version of the Final Report had been concealed by destruction of all but one copy as well as of galley proofs

and pages, drafts and memoranda by War Department officials. Although it had been intended for use in the preparation of the Supreme Court briefs in Hirabayashi and Yasui,<sup>13/</sup> the War Department withheld the first version of the Final Report from the Justice Department but chose to introduce the Report's allegations of evidence supporting an inference of Japanese American susceptibility to participation in espionage and sabotage through the amicus brief of the Attorneys General of California, Washington and Oregon.<sup>14/</sup> The altered Final Report was submitted

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<sup>13/</sup> Letter, Gen. DeWitt to McCloy, April 15, 1943; file 319.1, Section I, Records of the Western Defense Command and Fourth Army, Civil Affairs Division, Record Group 338, NARS, Washington, D.C.

<sup>14/</sup> Not only was a copy of the initial version of the Final Report provided to the West Coast attorneys general, but Capt. Herbert E. Wenig, a member of Gen. DeWitt's legal staff, was assigned to  
(footnote continued)

to this Court in Korematsu, but the Department of Justice was never informed of the existence or alteration of the original Final Report.

The initial version of the Final Report is significant because it demonstrated that the decision to intern Japanese Americans was based on racial and cultural prejudice rather than military considerations. Particular concern

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assist them in the preparation of the amicus brief. Letter, Gen. Robert Kenny to Col. Joel Watson, May 1, 1943, Hirabayashi File, Record Group 153 [Records of the Judge Advocate General's Office], Washington National Records Center, Suitland, MD. The amicus brief prepared by Wenig included lengthy excerpts from the initial version of the Final Report focusing on the racial characteristics argument. See Brief of the States of California, Oregon and Washington as Amici Curiae, pp. 10, 11, 14-20, 22-23, and 25-26. Justice Department attorneys later learned of and condemned the War Department's subterfuge. Memorandum, Edward Ennis to Herbert Wechsler, September 30, 1944, J.A. 272, 275.

was focused on the following statement in the original Final Report:

Because of the ties of race, the intense feeling of filial piety and the strong bonds of common tradition, culture and customs, this population [Japanese Americans] presented a tightly-knit racial group. It included in excess of 115,000 persons deployed along the Pacific Coast. Whether by design or accident, virtually always their communities were adjacent to very vital shore installations, war plants, etc. While it was believed that some were loyal, it was known that many were not. It was impossible to establish the identity of the loyal and the disloyal with any degree of safety. It was not that there was insufficient time in which to make such a determination; it was simply a matter of facing the realities that a positive determination could not be made, that an exact separation of the "sheep from the goats" was unfeasible.<sup>15/</sup>

This statement clearly contradicted the government's position in the courts that the lack of time to determine loyalty

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<sup>15/</sup> Final Report, Japanese Evacuation From the West Coast, 1942, [initial version], p. 9, ibid. Emphasis added.

was the basis for internment and showed that the true basis was Gen. DeWitt's belief that racial factors made it impossible to determine the loyalty of Japanese Americans.

For over two weeks, Gen. DeWitt strongly resisted the War Department's pressure to change his statement of the basis for the internment program:

My report as signed and submitted to Chief of Staff will not be changed in any respect whatsoever either in substance or form and I will not repeat not consent to any repeat any revision made over my signature. Higher authority may of course prepare and release whatsoever they so desire as views of that authority but statements in my signed report of evacuation are mine and so submitted. Submission of prepared revisions for presentation to me for acceptance or revision will accomplish nothing as final word on subject so far as I repeat I am concerned has been said. 16/

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16/ Message, DeWitt to Gen. Barnett, April 27, p. 43. See Hirabayashi, *supra*, 627 Fed. Supp. at 1450, 1450-1453.

Gen. DeWitt was eventually persuaded to allow his report to be changed and the following material alterations (in bold face below) appeared in the revised version of the Final Report.

Page iii, paragraph 2: "The security of the Pacific Coast continues to require the exclusion of Japanese from the area now prohibited to them and will continue for the duration of the present war." (Deleted from the original version.)

Page iii, paragraph 2: "More than 120,000 persons of Japanese ancestry resided in colonies adjacent to many highly sensitive installations. Their loyalties were unknown, and time was of the essence." (Added to the original version.)

Page 9. "It was impossible to establish the identity of the loyal and disloyal with any degree of safety. It was not that there was insufficient time in which to make such a determination; it was simply a matter of facing the realities that a positive determination could not be made, that an exact separation of the 'sheep from the goats' was unfeasible." (Deleted from the original version and replaced by the following sentence.)



Page 9: "To complicate the situation, no ready means existed for determining the loyal and the disloyal with any degree of safety. It was necessary to face the realities--a positive determination could not have been made." (Added to the original version.) Id. at 1452.

Knowledge of Gen. DeWitt's conclusions in the original Final Report would have been critical in establishing that the internment was the product of race prejudice rather than military considerations. Indeed, during oral argument in Korematsu, Solicitor General Fahy conceded that the internment would have been illegal had it been based on race prejudice rather than a military judgment.

MR. JUSTICE FRANKFURTER: Suppose the commanding general, when he issued Order No. 34, had said, in effect, "It is my judgment that, as a matter of security, there is no danger from the Japanese operations; but under cover of war, I had authority to take advantage of my hostility and clear the Japanese from this area."

Suppose he had said that, with that kind of crude candor. It would not have been within his authority, would it?

MR. FAHY: It would not have been.<sup>17/</sup>

Like the suppression of evidence discussed above, the concealment of Gen. DeWitt's true reasons for imposing the internment specifically against Japanese Americans deprived amici of material evidence directly supporting their constitutional challenges to the internment. As the District Court concluded in the Hirabayashi coram nobis proceeding:

It was General DeWitt who made the decision that military necessity required the exclusion of all persons of Japanese ancestry from the West Coast. The central issue before the Supreme Court . . . was whether exclusion was in fact required by military necessity. Nothing would have been more important . . . than to

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<sup>17/</sup> Transcript of Oral Argument before the Supreme Court, Korematsu v. United States, October 12, 1944, pp. 10-11. See Appendix, pp. 9-10.

know just why it was that General DeWitt made the decision that he did. The attorneys for the Justice Department assumed, and argued to the Supreme Court, that it was the need for prompt action that made the exclusion a military necessity. The statements by General DeWitt in his Final Report belied that assumption. His statement was that it was not time that made the exclusion necessary but rather the impossibility of determining whether any particular individual was or was not loyal.

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If the military necessity for exclusion was the impossibility of separating the loyal from the disloyal, the Supreme Court would not have had to defer to military judgment because this particular problem, separating the loyal for the disloyal, was one calling for judicial, rather than military, judgment.

627 F. Supp. at 1456-1457.

### III.

#### THE GOVERNMENT FALSELY STATES THAT IT DISAVOWED THE FINAL REPORT TO THIS COURT

##### A. The Government Intended To Con- ceal Exculpatory Evidence Contra- dicting The Final Report.

Defending its reliance on Gen.

DeWitt's Final Report, the government's brief goes to great lengths to argue that it made an "explicit dis-incorporation of the more colorful allegations of the Final Report" by the insertion of a footnote in the Korematsu brief. Gov. Br. at 33. This argument, however, like the footnote, is designed to mislead. The government posits that its footnote sufficiently alerted the Court to the factual inaccuracy of the Final Report. However, the actual wording of the footnote, its context within the brief and the manner in which it was drafted

all contradict this assertion. The footnote states:

The Final Report of General DeWitt (which is dated June 5, 1943, but which was not made public until January 1944), hereinafter cited as Final Report, is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the Final Report only to the extent that it relates to such facts. (Gov. Br., Korematsu, at 11.)

The footnote appears as a note to the statement:

The situation leading to determination to exclude all persons of Japanese ancestry from Military Area No. 1 and the California portion of Military Area No. 2 was stated in detail in the Government's brief in this Court in Hirabayashi v. United States, No. 870, October Term, 1942, and was reviewed in the opinion in that case, 320 U.S. 81. That statement need not be repeated here. Ibid.

Neither the actual language of the footnote nor the reference to the Hirabayashi brief indicates a disavowal of the accuracy of the Final Report or indicates that the government possessed materially contradictory evidence. To the contrary, the footnote implies that the government intended to rely upon the Final Report in relation to the facts stated in the Hirabayashi brief to justify the internment.

Had the government intended to inform the Court of the factual inaccuracies in the Final Report and the existence of the materially contradictory evidence, it could have done so in clearly understandable language. In fact, just such a footnote had been drafted by Justice Department attorneys for inclusion in the brief.



John L. Burling, Assistant Director of the Alien Enemy Control Unit, drafted a footnote to be inserted in the Korematsu brief:

The Final Report of General DeWitt (which is dated June 5, 1943, but which was not made public until January, 1944) is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. The recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of radio transmitters and to shore-to-ship signalling by persons of Japanese ancestry, in conflict with information in possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not ask the Court to take judicial notice of the recitals of those facts contained in the Report.<sup>18/</sup>

Clearly alerting the Court to contradictory evidence possessed by the Justice

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<sup>18/</sup> Memorandum, John L. Burling to Assistant Attorney General Herbert Wechsler, September 11, 1944, File 146-42-7, Records of the Department of Justice.

Department, the proposed footnote was included in the draft of the government's brief circulated to War Department and Justice Department officials.

In response, War Department officials undertook a campaign to excise the Burling footnote. At the apparent request of Assistant Secretary of War McCloy, the Solicitor General stopped the printing of the government's brief in order to change the footnote.<sup>19/</sup>

Upon learning of this action, Ennis prepared a memorandum to Assistant Attorney General Herbert Wechsler strongly recommending that the footnote not be altered.<sup>20/</sup> The memorandum,

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<sup>19/</sup> Memorandum, John L. Burling to Edward Ennis, October 2, 1944, File 146-42-7, Records of the Department of Justice, at 1.

<sup>20/</sup> Memorandum, Edward Ennis to Herbert Wechsler, September 20, 1944. JA 272.

which included copies of the FBI and FCC reports refuting the Final Report, was forwarded to Solicitor General Fahy. Ennis' memorandum warned against alteration or removal of the footnote:

This Department has an ethical obligation to the Court to refrain from citing [the Final Report] as a source of which the Court may properly take judicial notice if the Department knows that important statements in the source are untrue and if it knows as to other statements that there is such a contrariety of information that judicial notice is improper. Ibid.

Ennis further warned:

The general tenor of the report is not only that there was a reason to be apprehensive, but also to the effect that overt acts of treason were being committed. Since this is not so it is highly unfair to this racial minority that these lies, put out in an official publication, go uncorrected. This is the only opportunity which this Department has to correct them. Id. at 274.

Ennis concluded his memorandum with words that were to be regrettably prophetic:

...If we fail to act forthrightly on our own ground in the courts, the whole historical records of this matter will be as the military choose to state it. The Attorney General should not be deprived of the present, and perhaps only, chance to set the record straight. Id. at 276.

Subsequently, in a meeting of representatives of the War and Justice Departments on September 30, 1944, Burling observed that Captain Fisher, the War Department's representative:

took the position that he would not defend the accuracy of the report but that the Government would deal with sufficient honesty with the [Supreme Court] if it would merely refrain from reciting the report without affirmatively flagging our criticism thereof. Memorandum, Burling to Ennis, October 2, 1944, supra at 1.

Following this meeting and with the Solicitor General's authorization,

Wechsler drafted two alternatives to the original footnote for the approval of the War Department:

1. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the court to take judicial notice; and we rely upon the Final Report only to the extent that it relates to such facts.

2. We do not ask the court to notice judicially such particular details recited in the report as justification for the evacuation as the use of illegal radio transmitters and shore-to-ship signaling by person of Japanese ancestry, which conflict with information derived from other sources.<sup>21/</sup>

According to Wechsler, the first alternative was designed to "drop out any reference to matters in controversy" and

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<sup>21/</sup> Memorandum, Fisher to McCloy, October 2, 1944, File 014.311 Western Defense Command Exclusion orders (Korematsu), Box 9, Record Group 107, National Archives.

was phrased in "the gentlest conceivable way."<sup>22/</sup>

The vaguely worded first alternative, selected by the War Department, concealed the existence of vitally important exculpatory evidence undermining the factual justification for the internment. The effectiveness of the government's concealment is apparent in Korematsu for the Court relied upon the judgment of the military authorities finding that the exclusion order did have "a definite and close relationship to the prevention of espionage and sabotage." Korematsu, supra, 323 U.S. 214, 218. The critical importance of the suppression of the evidence contradicting the assertions of military necessity is underscored by the dissenting opinion of Justice Jackson:

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<sup>22/</sup> Transcript, telephone conversation between Fisher and Wechsler, October 2, 1944.



How does this Court know that these orders have a reasonable basis in necessity? No evidence whatever has been taken by this or any other court. There is a sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable.  
Id. at 245.

The government's concealment of the contradictory evidence deprived amici of the ability to challenge the allegations of military necessity as well as the credibility of the military commander. In light of the Court's reliance on and deference to the opinions of the military commander as the basis for its opinions, the government could hardly — have suppressed evidence more material or critical to amici's cases.

B. The Government Did Not Repudiate The Factual Allegations Of The Final Report.

The government's present contention that, by the Korematsu footnote, it disclaimed any reliance on the false statements in the Final Report is wholly lacking in merit. Not only was the footnote carefully crafted to avoid such a disclaimer, but the government explicitly warranted the validity of the Final Report in its oral argument to this Court in Korematsu. Thus, in response to the Court's query as to whether, as one amicus maintained, the footnote repudiated the Final Report, Solicitor General Fahy clearly affirmed the government's continuing reliance on Gen. DeWitt's opinions:

It is even suggested that because of some foot note in our brief in this case indicating that we do not ask the Court to take judicial notice of the truth of every recitation or instance in the final report of General DeWitt,

that the Government has repudiated the military necessity of the evacuation. It seems to me, if the Court please, that that is a neat little piece of fancy dancing. There is nothing in the brief of the Government which is any different in this respect from the position it has always maintained since the Hirabayashi case--that not only the military judgment of the general, but the judgment of the Government of the United States, has always been in justification of the measures taken; and no person in any responsible position has ever taken a contrary position, and the Government does not do so now. Nothing in its brief can validly be used to the contrary.<sup>23/</sup>

Moreover, Mr. Fahy argued, the Final Report did demonstrate that the internment was based on military necessity:

MR. FAHY: ...It was suggested yesterday, and it is argued with some vigor in the brief of the Amicus Curiae, that notwithstanding the decision of the Court in the Hirabayashi case that the orders were justified under the exercise of the war power, the Court did not then have before it all the facts, and that now, after the event, we

<sup>23/</sup> Transcript of Oral Argument before the Supreme Court, Korematsu v. United States, October 12, 1944, p. 7. See Appendix.

know that the facts did not justify evacuation as a military measure.

THE CHIEF JUSTICE: What do you mean by that? Is it argued that there was no basis on which the military judgment could be founded?

MR. FAHY: It must be that, Your Honor, because that is the test. The final report of General DeWitt was held up to Your Honors yesterday as proving that he himself had no rational basis on which to make a military judgment. I am not going into the details of that report, because no doubt the Court will read it. However, I do assert that there is not a single line, a single word, or a single syllable in that report which in any way justifies the statement that General DeWitt did not believe he had, and did not have, a sufficient basis, in honesty and good faith, to believe that the measures which he took were required as a military necessity in protection of the West Coast. (Emphasis added.) Id. at 6-7.

In response to further questioning, the Solicitor General continued to stand by the validity of the Final Report:

THE CHIEF JUSTICE: As I understood the argument of the other side, it was that this report, taken as a whole, could be taken to exclude the possibility of a basis for military judgment to continue these

exclusion orders. We are dealing now only with exclusion orders.

MR. FAHY: Yes; that is their position.

THE CHIEF JUSTICE: Do you challenge that position?

MR. FAHY: We say that the report proves the basis for the exclusion orders. There is not a line in it that can be taken in any other way. It is a complete justification and explanation of the reasons which led to his judgment. Id. at 9-10.

Since June 1985, the government has been aware of Solicitor General Fahy's arguments to this Court, for the transcript was introduced as evidence in the trial of Mr. Hirabayashi's coram nobis petition. That the government has not only failed to inform this Court of that transcript, but has taken a position directly contradicted by the Solicitor General's arguments, only underscores the disturbing issues raised by the government's egregious abuse of power in the 1940s.

## CONCLUSION

The 40 year effort of Messrs. Korematsu, Hirabayashi and Yasui challenging the constitutional validity of the Japanese American internments rests upon their deeply held belief in and respect for our American constitutional principles. By this brief they seek correction of the wrongs done to them and all Japanese Americans by the government's misconduct and its dishonesty during the prosecution of their original cases.

Dated: February 17, 1987

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

FRED TOYOSABURO KOREMATSU,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 22
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	
	)	

Washington, D.C.

Thursday, October 12, 1944

The arguments in the above-entitled  
matter were resumed at 12 o'clock noon.

BEFORE:

CHIEF JUSTICE HARLAN F. STONE and  
ASSOCIATE JUSTICES ROBERTS, BLACK,  
REED, FRANKFURTER, DOUGLAS, MURPHY,  
JACKSON and RUTLEDGE

APPEARANCES:

On behalf of Appellants:

Mr. Jackson H. Ralston  
Mr. Wayne M. Collins  
Mr. Charles A. Horsky

On behalf of Appellee:

Mr. Charles Fahy,  
Solicitor General of  
the United States

Pages 6:1 - 7:26

MR. FAHY: . . . In the first place, we say that the order, as I have already related, was clearly within the scope of the statute, leaving as the first fundamental question in the case, "Was the application of the order to the respondent constitutional and consistent with due process if otherwise constitutional?"

That brings us to the question of the nature of the order in relation to the military situation, and the efforts made in this manner to protect the West Coast, under the threat of invasion, from espionage and sabotage.

The facts in that regard are essentially the same as those reviewed

by this Court in the Hirabayashi case, fully briefed by the Government.

Because the question was fully briefed in that case, it is briefed with less elaboration in this case.

It was suggested here yesterday, and it is argued with some vigor in the brief of the Amicus Curiae, that notwithstanding the decision of the Court in the Hirabayashi case that the orders were justified under the exercise of the war power, the Court did not then have before it all the facts, and that now, after the event, we know that the facts did not justify evacuation as a military measure.

THE CHIEF JUSTICE: What do you mean by that? Is it argued that there was no basis on which the military judgment could be founded?

MR. FAHY: It must be that, Your

Honor, because that is the test. The final report of General DeWitt was held up to Your Honors yesterday as proving that he himself had no rational basis on which to make a military judgment. I am not going into the details of that report, because no doubt the Court will read it. However, I do assert that there is not a single line, a single word, or a single syllable in that report which in any way justifies the statement that General DeWitt did not believe he had, and did not have, a sufficient basis, in honesty and good faith, to believe that the measures which he took were required as a military necessity in protection of the West Coast.

THE CHIEF JUSTICE: Has each of us a copy of that report?

MR. FAHY: I think not, Your Honor;

but I am sure the War Department can make them available.

THE CHIEF JUSTICE: Will you make them available?

MR. FAHY: Yes.

It is even suggested that because of some foot note in our brief in this case indicating that we do not ask the Court to take judicial notice of the truth of every recitation or instance in the final report of General DeWitt, that the Government has repudiated the military necessity of the evacuation. It seems to me, if the Court please, that that is a neat little piece of fancy dancing. There is nothing in the brief of the Government which is any different in this respect from the position it has always maintained since the Hirabayashi case--that not only the military judgment of the general, but



the judgment of the Government of the United States, has always been in justification of the measures taken; and no person in any responsible position has ever taken a contrary position, and the Government does not do so now. Nothing in its brief can validly be used to the contrary.

. . .

Pages 8:19-10:2

MR. JUSTICE JACKSON: What is the status of this report? It does not seem to be a report to Congress.

MR. FAHY: No. It is a report of the commanding general to the Secretary of War.

MR. JUSTICE JACKSON: Is it your view that the Court can take judicial notice of the facts which it recites?

MR. FAHY: Not all of them, Your Honor. I think the Court is required to

take judicial notice only of those facts which are of the character of public general knowledge. Beyond that, as to the details in the report, certainly the Court is entitled, it seems to me, to consider them in proving what the general was thinking, his motive, and what he had before him when he made the judgment which he made. Otherwise I see nothing to be done, if the Court please, except that the case go back to be heard, and that all this be gone into in a trial, which the Government does not suggest.

MR. JUSTICE JACKSON: There is a difference on that point. One of the briefs takes very sharp issue with some of the statements of fact.

MR. FAHY: Yes.

MR. JUSTICE JACKSON: And in certain instances in which the report is

silent as to dates, it is pointed out that the occurrences stated in the report were after the Japanese had all been evacuated. What is our duty in a case of that kind? Where do we get the facts, if the facts become important?

MR. FAHY: I do not think Your Honor can rely upon the facts other than those which are matters of common knowledge, or which come from sources of which the Court can take judicial notice, and from which such facts can be made available to the Court. If it should become important, we would make every effort to do that.

THE CHIEF JUSTICE: As I understood the argument of the other side, it was that this report, taken as a whole, could be taken to exclude the possibility of a basis for military judgment to continue these exclusion

orders. We are dealing now only with exclusion orders.

MR. FAHY: Yes; that is their position.

THE CHIEF JUSTICE: Do you challenge that position?

MR. FAHY: We say that the report proves the basis for the exclusion orders. There is not a line in it that can be taken in any other way. It is a complete justification and explanation of the reasons which led to his judgment.

. . .

Pages 10:25-11:9

MR. JUSTICE FRANKFURTER: Suppose the commanding general, when he issued Order No. 34, had said, in effect, "It is my judgment that, as a matter of security, there is no danger from the Japanese operations; but under cover of

war, I had authority to take advantage of my hostility and clear the Japanese from this area." Suppose he had said that, with that kind of crude candor. It would not have been within his authority, would it?

MR. FAHY: It would not have been.

MR. JUSTICE FRANKFURTER: As I understand the suggestion, it is that, as a matter of law, the report of General DeWitt two years later proved that that was exactly what the situation was. As I understand, that is the legal significance of the argument.

MR. FAHY: That is correct, Your Honor; and the report simply does nothing of the kind.

. . .

Pages 12:27-13:3

MR. FAHY: As to General DeWitt's report, Mr. Justice Frankfurter, he

concludes his report, after reviewing all the reasons which had motivated him from a military standpoint, with the following statement:

"The Commanding General, charged, as he was, with the mission of providing for the defense of the West Coast, had to take into account these and other military considerations."

He had referred to them in the body of his report.

"He had no alternative but to conclude that the Japanese constituted a potentially dangerous element from the viewpoint of military security; and military necessity required their immediate evacuation to the interior. The impelling military necessity had become such that any measures other than those pursued along the Pacific Coast might have been too little and too



late."

MR. JUSTICE FRANKFURTER: That does not preclude the conviction that a wiser man would not have so concluded.

MR. FAHY: Of course not. The military may make mistakes. We know of many that have been publicized during this war. I will not say "many." We know of some. For example, in the invasion of Sicily, hundreds of our own men were shot down by our own forces. Someone made a mistake.

THE CHIEF JUSTICE: The military necessity could not be measured wholly in terms of invasion. It included the dangers envisaged by the Presidential order, which related to espionage and sabotage.

MR. FAHY: That is correct. The report goes into that aspect of it. He views the situation from the standpoint

of the deterioration, as he calls it, of the military situation in the Pacific in relation to the situation interiorally on the Pacific Coast, and comes to the judgment that under the threat arising from the exterior, with all the facilities on the West Coast, the danger was such that he could not feel secure in the defense of the Coast without the removal of this part of the population.